General Fabrications Corp. *and* Sheet Metal Workers International Association of Northern Ohio Local Union No. 33, AFL–CIO. Cases 8–CA–29443, 8–CA–29444, 8–CA–29445, 8–CA–29446, 8–CA–29507, 8–CA–29520, 8–CA–29591, 8–CA–29728, 8–CA–29756, 8–CA–29820, and 8–RC–15667

August 5, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 17, 1998, Administrative Law Judge George Carson II issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs to the Respondent's exceptions. The Charging Party filed an answering brief to the Respondent's exceptions. The Respondent filed a reply brief to the General Counsel's and the Charging Party's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

The Respondent has excepted to the judge's recommendation that a *Gissel*[3] bargaining order be issued. It asserts that this remedy would be inappropriate because the "Union remains a very viable presence at the Company and most assuredly can obtain a fair rerun election." We find no merit in the Respondent's arguments.

In *Gissel*, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')."[4] The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board

> can properly take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[5]

In agreeing with the judge that a *Gissel* bargaining order should be issued, we find, for the reasons set forth below, that the Respondent's course of misconduct, both before and after the election, falls at least into category II. The Respondents' unfair labor practices clearly demonstrate that the holding of a fair election in the future would be unlikely and that the "employees' wishes are better gauged by an old card majority than by a new election."[6]

Because this case falls at least within category II, we have, as mandated by the Supreme Court in *Gissel*, examined the extensiveness of the Respondent's unfair labor practices and the likelihood of their recurrence in the future. In this regard, we observe that the unfair labor practices committed in this case include "hallmark" violations such as the discharge, layoff, and suspension of employees who engaged in union activity during the organizational campaign, as well as threats of job loss, plant closure, and futility in the event of a union victory.[7]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends, inter alia, that the judge improperly credited one part, but discredited another part, of employee Gerald Rahm's testimony. We note, however, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950).

The judge found that Supervisor Mike Belch told employee Pitts that "the doors would not be opened if the Union came in, that the company would shut down," in violation of Sec. 8(a)(1). However, as the date for this conversation is not established, it cannot be determined if it was made within the critical period. Thus, it cannot be used to support the Union's Objection 25 regarding threats of plant closure. We nevertheless sustain the Union's Objection 25 based on the unlawful threat of plant closure made by the Respondent's president, Chester (Chet) Boraski during a mid-November 1997 conversation with employees Rahm and Terry Trushell.

[2] The judge's conclusions of law stated that the Union has been the exclusive collective-bargaining representative in the appropriate unit since December 4, 1997, and that by refusing to recognize and bargain with the Union since that date the Respondent has violated Sec. 8(a)(5). However, the judge inadvertently failed to find that the Union had claimed majority status, and requested recognition and bargaining on December 4, 1997. Union Organizer Matthew Oakes testified, without contradiction, that on December 4, 1997, he and Business Agent George Reising spoke with the Respondent's president, Boraski, and tried to hand him a letter which he refused to take. Oakes testified that he then read the letter to Boraski and explained to him "that we represented a majority of his employees, and we were requesting voluntary recognition." Boraski referred them to his attorney. The letter, which was submitted into evidence, advised Boraski that the Union represented the majority of the Respondent's employees and requested recognition and bargaining.

[3] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[4] *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (quoting *Gissel*, 395 U.S. at 613–614).

[5] 395 U.S. at 614–615.

[6] 82 F.3d at 1078.

[7] The term "hallmark violations" has been used to describe unfair labor practices that are highly coercive and have a lasting effect on elec-

The Respondent also committed numerous other serious and pervasive unfair labor practices: more closely monitoring union supporters, threatening not to excuse the absence of a union supporter, restricting union supporters from talking to other employees, harassing and interrogating union supporters, and threatening loss of benefits and stricter enforcement of company rules.

The coercive effect of the Respondent's misconduct cannot be denied. These serious violations, which directly affected the entire unit, began almost immediately after the Respondent learned of employees' union organizing activity and in one instance continued even after the election. In this small unit of approximately 31 employees, the Respondent unlawfully discharged, laid off, or suspended seven union supporters prior to the election, six almost immediately upon learning of the existence of union activity. This conduct "goes to the very heart of the Act"[8] and is not likely to be forgotten. "Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity."[9] The impact of this action was magnified by its proximity to the onset of the Union's organizational effort. This conduct by the Respondent sent employees "the unequivocal message that it was willing to go to extraordinary lengths in order to extinguish the union organizational effort." Id. It is reasonable to infer that such a message will have a lasting effect on the unit employees' exercise of their right to organize. Id.

The severity of the misconduct is compounded by the involvement of high-ranking officials.[10] The Respondent's unfair labor practices emanated from the highest level officials, with many attributable to the Respondent's general manager and its owner/president. For example, on November 4, 1997, shortly after several employees had signed authorization cards, the Respondent's owner and president, Chester Boraski, told employees, inter alia, that employees who were dissatisfied working for the Respondent should seek work elsewhere and that he would not build future projects at the Sandusky facility in the event of a union victory. General Manager Robert Garba confirmed Boraski's statement and also threatened loss of work if the workers proved "[un]reliable." Both sets of remarks clearly violated Section 8(a)(1). In a meeting held shortly thereafter, Boraski held up the keys to the plant and threatened to close or move the plant in the event of a union victory. In mid-January 1998, Boraski made another statement implying that the employees' organizational efforts would be futile. "When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[11]

Although the unlawfully discharged and laid-off employees are entitled to reinstatement and backpay, these remedies would not, in our view, erase the coercive effects of the Respondent's antiunion conduct. The reinstated employees would not likely again risk incurring the Respondent's wrath and another period of unemployment by resuming their union activities.

The Respondent's misconduct continued even after the election, when the Respondent violated Section 8(a)(1) by interrogating employee Gerald Rahm regarding whether he had given an affidavit to the Union in support of its election objections and directing him to refuse to do so if asked. An employer's continuing hostility toward employee rights in its postelection conduct "evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort." *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995).

In this case, there is no claim that a *Gissel* order is not warranted because of the passage of time between the *Gissel* order and the unfair labor practices which justified it, or because of the intervening turnover of employees and management. These issues which have concerned some courts in denying enforcement of our *Gissel* orders[12] are not present here. There has been a relatively short time period between the unfair labor practices and the issuance of this Order, and there is no evidence of any substantial turnover of management or employees, other than that caused by the Respondent's unlawful discharge of several union supporters.[13] Indeed, the Respondent does not even argue that changed circumstances preclude the issuance of a bargaining order.[14]

tion conditions. See *NLRB v. Jamaica Towing,* 632 F.2d 208, 212–213 (2d Cir. 1980).

[8] *NLRB v. Entwistle Mfg. Co*., 120 F.2d 532, 536 (4th Cir. 1941).

[9] *Consec Security*, 325 NLRB 453, 454 (1998).

[10] Id. at 454.

[11] Id. See *Electro-Voice*, 320 NLRB 1094, 1096 (1996); *America's Best Quality Coatings Corp*., 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S 1158 (1995).

[12] For example, the District of Columbia Circuit has stated that to justify the imposition of a *Gissel* bargaining order, the Board must:

> find that a bargaining order is necessary *at the time it is issued* and support its finding with a "reasoned explanation that will enable the reviewing court to determine from the Board's opinion (1) that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act, (2) why it concluded that other purposes must override the rights of the employees to choose their bargaining representatives and (3) why other remedies, less destructive of employees' rights, are not adequate."

Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1173 (D.C. Cir. 1998)(emphasis in original), quoting *NLRB v. Charlotte Amphitheater,* 82 F.3d at 1078 (citations omitted).

[13] "It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover has resulted from the employer's unlawful discharge[s]." *NLRB v. Balsam Village Management Co*., 792 F.2d 29, 34 (2d Cir. 1986).

[14] The District of Columbia Circuit made clear in *Charlotte Amphitheater* that the burden is on a respondent to bring to the Board's attention evidence of changed circumstances that would mitigate the need for a bargaining order. Thus, the court stated that before issuing a bargaining order, "the Board has no affirmative duty to inquire whether

In concluding that a *Gissel* order is warranted, we have examined its appropriateness under the circumstances existing at the present time and we have considered the inadequacy of other remedies. See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d at 1173. Further, as discussed below, we have given due consideration to the employees' Section 7 rights, another concern expressed by some courts.[15]

In *Gissel*, the Supreme Court rejected the argument advanced by the employers that a bargaining order is a punitive remedy that "needlessly prejudices employees' Section 7 rights." 395 U.S. at 612. The Court stated that a bargaining order not only deters "future misconduct," but also remedies "past election damage." Id. The Court reasoned as follows:

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.[33] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we have pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." [395 U.S. at 612–613 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).]

This passage clearly shows that in approving the Board's use of the bargaining order remedy in category I and II cases, the *Gissel* Court explicitly took into account the rights of employees both who favored and opposed union representation. The Court stated that if an employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then "the only fair way to effectuate employee rights" is to issue a bargaining order.[16] In these circumstances, the interests of the employees favoring unionization are safeguarded by the bargaining order. The interests of those opposing the union are adequately safeguarded by their right to file a decertification petition pursuant to Section 9(c)(1) of the Act. On the other hand, if the facts of a case fall within category III, i.e., the employer committed only "minor or less extensive unfair labor practices" with only a "minimal impact on the election machinery," then a bargaining order may not issue, notwithstanding the fact that a majority of employees signed authorization cards in support of the union. 395 U.S. at 615.

In sum, the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights "to bargain collectively" and "to refrain from" such activity. Therefore, if a bargaining order has been adequately justified under the *Gissel* standards, then we respectfully submit that due consideration has been given to the employees' Section 7 rights consistent with the concerns expressed by the District of Columbia Circuit.

Accordingly, for all these reasons, we agree with the judge that a *Gissel* bargaining order is an appropriate and necessary remedy in this case.[17]

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[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. [Citation omitted.] Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 135 (1964).

employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices." 82 F.3d at 1080.

[15] See fn. 12, supra.

[16] The Court observed, 15 years earlier, in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), that the Act placed "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers." Thus, the statute itself subordinates the rights of the minority to those of the majority. See Sec. 9(a) of the Act.

[17] Our dissenting colleague would not grant a bargaining order at this time, but would reserve judgment on the *Gissel* bargaining order until after the election results in the representation case are known. Further, he would consider granting such an order only in the event the union lost the election. It is, however, well settled that the Union is entitled to both a bargaining order and a certification of representative in the event the revised tally of ballots shows that it won the election. See, e.g., *A.P.R.A. Fuel Oil*, 309 NLRB 480 (1992), enfd. in relevant part 28 F.3d 103 (2d Cir. 1994); *Dlubak Corp*., 307 NLRB 1138, 1177 (1992), enfd. 5 F.3d 1488 (3d Cir. 1993); *Eddyleon Chocolate Co*., 301 NLRB 887, 892 (1991); *Marion Center Supply*, 277 NLRB 262 fn. 2 (1985); *Regency Manor Nursing Home*, 275 NLRB 1261 fn. 5 (1985); *Gordonsville Industries,* 252 NLRB 563, 604 (1980); *Kurz-Kasch, Inc*., 239 NLRB 1044, 1045 (1978); *Great Atlantic & Pacific Tea Co*., 230 NLRB 766 (1977); *Pope Maintenance Corp.*, 228 NLRB 326, 348 (1977).

Demi's Leather Co., 321 NLRB 966 (1996), on which our dissenting colleague relies, is not inconsistent with these cases. The Board, in the particular circumstances of that case, merely postponed a determination as to whether a bargaining order was appropriate until after the election issues were resolved but made it clear that the case was to be transferred back to the Board after the issuance of a revised tally of ballots. There is no suggestion in *Demi's Leather* that the results of the election

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, General Fabrications Corp., Sandusky, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

IT IS FURTHERED ORDERED that Case 8–RC–15667 is severed from Cases 8–CA–29443, 8–CA–29444, 8–CA–29445, 8–CA–29446, 8–CA–29507, 8–CA–29520, 8–CA–29591, 8–CA–29728, 8–CA–29756, and 8–CA–29820, and that it is remanded to the Regional Director for Region 8 for action consistent with this Decision.

MEMBER HURTGEN, concurring and dissenting in part.

My colleagues have issued a *Gissel* bargaining order. I would not do so at this time.

In *Gissel,* 395 U.S. 575, 614 (1969), the Supreme Court approved the Board's use of the bargaining order, in certain circumstances. The Court's language was as follows:

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Id. at 614–615.

Thus, a *Gissel* order is based on a finding that a fair election (here a rerun) cannot likely be held. In the instant case, *there may be no rerun election at all*. In the election of January 20, there were 13 votes cast for, and 14 votes against, the Union. There were four challenged ballots. The challenges to all of these ballots are now overruled. These ballots include ballots of three of the discriminatees. Thus, there is at least a reasonable possibility that the Union has won the election, a certification of the Union will issue and no new election will be held.

In addition, *Gissel* orders are reserved for those cases where the employer's unfair labor practices "have in fact undermined a union's majority."[1] As discussed above, the Union here may have *retained* its majority status in the election.

In sum, it may well be that the extraordinary remedy of a *Gissel* bargaining order is not required. More importantly, in light of the *Gissel* language, such an order is wholly inappropriate at the present time.[2]

Thus, I would reserve judgment on the *Gissel* bargaining order until after the election results in the representation case are known.[3]

My colleagues seek to distinguish *Demi's Leather,* supra. The effort is unsuccessful. As in that case, I am simply not passing on the *Gissel* issue *at this time*. As in that case, the instant case should be returned to the Board after the issuance of a revised tally of ballots. As indicated above, if the Union has lost, I would then decide the *Gissel* issue.

To the extent that other cases (all pre-*Demi's Leather*) are inconsistent with *Demi's Leather,* I would follow *Demi's Leather*. It is based upon the aforementioned language of *Gissel*. That is, the Supreme Court contemplated that *Gissel* orders could be issued in cases where the election has not yet been held or in cases where the union lost the election and that election is being set aside. The Court did not contemplate a *Gissel* order where the Union wins the election and is certified.

Paul C. Lund, Esq., for the General Counsel.
Timothy C. McCarthy, Esq., for the Respondent.
Richard P James, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was heard in Port Clinton, Ohio, on June 8 through 12, 1998,[1] pursuant a consolidated complaint that issued on May 6, 1998.[2] The complaint, as amended, alleges various violations of Section 8(a)(1) of the Act and the discriminatory treatment of two employees and the termination of five employees in violation of Section 8(a)(3) of the Act. The suspension and termination of a sixth employee is alleged as a violation of both Section 8(a)(3) and (4) of the Act. The complaint requests that the remedy include a bargaining order and alleges violation of Section 8(a)(5) of the Act as a result of Respondent's refusal to recognize the Union and two unilateral changes. On May 13, 1998, the Regional Director issued an order that directed a hearing on objections and challenged ballots in Case 8–RC–15667 and consolidated that case for hearing with the unfair labor practice cases. Respondent's answer denies all violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

would have any bearing on the Board's final determination as to whether a bargaining order should be granted. By contrast, our dissenting colleague states that he will consider the propriety of the bargaining order remedy only "if the Union has lost."

[1] See *DTR Industries v. NLRB*, 39 F.3d 106, 112 (1994).

[2] See *Demi's Leather Corp.*, 321 NLRB 966, 967 (1996).

[3] If the Union has lost the election, I would then decide the issue of whether to hold a second election *or* issue a *Gissel* order.

[1] All dates are 1997 unless otherwise indicated.

[2] The charges in Cases 8–CA–29443, 8–CA–29444, 8–CA–29445, and 8–CA–29446 were all filed on November 5. The charge in Cases 8–CA–29443 was amended on April 24, 1998; the charge in Case 8–CA–29507 was filed on November 28 and was amended on December 29; the charge in Case 8–CA–29520 was filed on December 4 and was amended on April 24, 1998; the charge in Case 8–CA–29591 was filed on January 7, 1998; the charge in Case 8–CA–29728 was filed on March 10, 1998, and amended on April 24, 1998; the charge in Case 8–CA–29756 was filed on March 18, 1998, and the charge in Case 8–CA–29820 was filed on April 8, 1998, and amended on April 24, 1998.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, General Fabrications Corp., a corporation, is engaged in the design, fabrication, and installation of spray washers, dry-off ovens, bake ovens, paint booths, conveyers, and other related systems at its facility in Sandusky, Ohio, at which it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Ohio. The Respondent admits, and I conclude and find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I conclude and find, that Sheet Metal Workers International Association of Northern Ohio, Local Union No. 33, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

General Fabrications Corp., the Respondent, is the family business of Chester (Chet) Boraski who established it in 1982. His wife Carol serves as personnel director. During 1997, his daughter worked part time, although the record does not identify her position. Respondent operates out of two buildings, referred to as plant 1 and plant 2. In October, approximately 8 unit employees worked in plant 1 and approximately 16 worked in plant 2. An additional seven unit employees regularly performed installation work in the field. Employees who regularly worked at the plants would, on occasion, be sent into the field.

Plant 1, the smaller building, contains the electrical department where electrical panels necessary to operate the equipment fabricated in plant 2 are constructed. Plant 1 also contains the shearing machine, which cuts metal, and the breaking machine, which bends the metal to prescribed specifications. Plant 1 is also where panels for the ovens are built. In October, eight employees regularly worked in plant 1 including three electricians and one helper, the operator of the shearing machine, the operator of the breaking machine, and two oven panel builders. The office of Electrical Engineering Manager Arnold Kath is located in plant 1.

Plant 2, the larger building, is the fabrication facility where the metal pieces are welded together to make washer tanks, paint booths, and ovens. The 16 employees who perform this work are classified as welder/fabricators and laborers. Respondent's top managers, other than Kath, had offices located in plant 2. In 1997, this included President Boraski, General Manager Robert Garba, Plant Manager Mike Tyree, and Shift Supervisor Mike Belch.

In late October, employee Frank Mikolay contacted the Union. On October 29, Union Organizer Matt Oakes held a meeting that was attended by employees Mikolay, Davin Jones, Ed Collins, James Roberts, Chris Wade, and Terry Trushell. All the employees except Trushell signed union authorization cards. The employees were given union literature to read and to distribute to their fellow employees. On October 31, Oakes conducted a second union meeting. This meeting was attended by employees Mikolay, Bryan Cloud, John Johnson, Ron Fields, Jeremiah Pitts, Bill Harvey, and Bill Montgomery. All of the employees signed union authorization cards, with the exception of Mikolay who had signed a card on October 29. The employees were given union literature to read and to distribute to their fellow employees.

B. Supervisory Status of Kyle Perkins

The complaint alleges, and the answer denies, that Kyle Perkins was a supervisor. Perkins was introduced as the supervisor of the short-lived second shift in October, and the record reflects that he issued documents purporting to be warnings to second-shift employees on October 30 and November 11 and 14. Upon the termination of second shift, sometime before Christmas, Perkins became a leadman on first shift. Although he retained a key to the office, there is no probative evidence that Perkins exercised any supervisory authority after the second shift was discontinued. Since all of the threats attributed to him occurred when Perkins was a leadman on first shift, it is unnecessary for me to address his authority on second shift.

C. Knowledge of Union Activity

The union literature distributed at the October 29 and 31 meetings was distinctively colored and included fliers printed on red, yellow, and green paper. On October 30, Davin Jones, who worked in plant 2, gave copies of the literature he had been given at the October 29 meeting to fellow employees including Freeman Hunter and an employee he identified as Thomas, presumably electrician Thomas Searcy. Searcy normally worked in plant 1 but, at that time, was performing electrical work in plant 2. Searcy's receipt of literature from Jones on October 30 is not inconsistent with his thereafter, on November 4, asking fellow electricians Fields and Johnson whether they had attended any union meetings. Jones also talked to other employees, including Jeremiah Pitts and Gerald Rahm, urging them to come to the next meeting. He placed the remaining literature on his welding machine, in plain view, with his welding helmet. During the course of the day, employee Terry Trushell, who had attended the union meeting but who had not signed an authorization card, spoke with General Manager Bob Garba. As they were talking to each other, Trushell and Garba were looking directly at Jones. On this same day, Boraski, Garba, Plant Manager Tyree, and Supervisor Mike Belch met together in the lunchroom. When the meeting concluded, they all came down the stairs and walked around the floor in plant 2.

On October 30, in plant 1, Ed Collins distributed literature to electrician Ron Fields and electrician helper Bryan Cloud. He left the remaining leaflets on his toolbox which was located at the end of the long table upon which he worked. James Roberts gave leaflets to electrician John Johnson and shearing machine operator Bill Harvey. He placed the remaining leaflets in his lunchbox.

I do not credit Boraski's uncorroborated testimony that he first learned of the union organizational activity on or about November 5 or 6, when Plant Manager Garba brought some union literature to him. Garba, who testified on behalf of Respondent and is Respondent's general manager, was not asked to confirm either that this transaction had occurred or the date upon which Boraski claimed it had occurred. Garba did not deny conversing with employee Trushell and looking at Jones while doing so. None of the managers involved in the lunchroom meeting on October 30, who thereafter walked throughout the plant, denied either the meeting or their subsequent conduct. Neither Tyree nor Belch was asked when he became aware of the employees' union organizational activities. Neither Tyree nor Belch denied observing the union literature that Jones had placed on his welding machine on October 30.

Boraski acknowledged being a "hands on" manager, regularly walking through both plants. Several times he referred to Respondent being a "small company," and he testified that supervisors reported anything out of the realm of every day business to him. Employees confirmed that managers and supervisors were regularly on the floor in plants 1 and 2.

I find that the open union activity of employee Jones in plant 2 came to Respondent's attention on October 30. Thereafter, on either October 30 or 31, Respondent became aware of the open union activity of Collins and Roberts in plant 1. Jones was discharged on October 30, a Thursday. Collins and Roberts were permanently laid off on Monday, November 3.

D. The November 4 Meeting and Alleged Threats

Respondent held a meeting of its employees on November 4, at which they were addressed by Boraski and General Manager Garba. Boraski, whom I do not credit, testified that he held the meeting after he had received unsolicited telephone calls on four or five occasions, beginning in late September and continuing until November 3. In two of these, he said he only heard cuss words, no threats were made. He testified that the caller was a male and that he suspected he was an employee, although he could not identify his voice. In one of the earlier calls, he states the caller threatened to "kick his ass." In a call a week or 10 days prior to November 3, he testified that the caller referred to seeing that he was "still working late," and asked, "[A]ren't you scared to be there?" On November 3, he testified that the caller referred to Carol Boraski walking around the plant and stated that "they're gonna get me and my family."

Boraski's remarks, which were taped by Mikolay, are as follows:

> Gentlemen, I don't know what's going on. I'm not in a very good mood this morning. Number one, I was up late last night and early this morning. I probably only got a couple hours of sleep. Myself and my family have been threatened, and I'm going to tell you right now I will not succumb to any threats from anybody. I apologize to the employees who are here that shouldn't be here, who are here everyday, work hard, trustworthy, dependable, please accept my apology. When you hired in, whoever interviewed you, you said that you would work, you wanted the job, that you would work, be here every day, work hard, we said that we would pay you this much, you said fine, we said fine. This is what you call an at will employment. That at will employment is that you can leave at any time, and we can dismiss you at any time. In the past eight to eleven months our attendance is the worst in Sandusky, our work ethic had dropped after a lot of years, you older people know what I'm talking about. If you don't want to work here the front door is right there and downstairs. If you don't want to work here and you want another job see me. I will help you find a job. I've got many contacts in Sandusky. I'll be more than happy to help you get another job. But I will not succumb to a threat of any kind or from anybody. We got new projects, orders for projects. These projects will not be built in Sandusky, Ohio, as of this point in time, they will not. Any future orders will not be built in Sandusky, Ohio. I will not succumb to a threat of any kind from anybody.
>
> MIKOLAY: What kind of threat are you exactly talking about Chet?
>
> UNIDENTIFIED VOICE: I'm confused here Chet, what exactly is going on?
>
> BORASKI: I don't know what's going on, the only thing I know is that it's got to stop I will not bring another project into this plant at all until the following improves: Number one, the person or persons who are making the threats to myself and my family come see me. That's number one. Those of you know, that's number one.

Following these remarks, Boraski commented upon the need to improve attendance, productivity, and trustworthiness and dependability, referring to a cash shortage in the candy box. Candy was dispensed on the honor system from a box instead of being vended from a machine. Following Boraski's remarks, Garba addressed the employees. He began his remarks by stating that is was a shame that "we can't have a box of candy bars laying around." He continued stating:

> What happens here I guess depends on what everybody in this room does. Whether the work is brought in here or if we all have jobs. I want to work here, I've got over ten years in this company. I want to stay here, I want to retire from this company. I don't know how everyone else feels, but that's important to me, stability.
>
> MIKOLAY: Hold on real quick, I got something I'd like to bring up real quick. We're not going to be bringing no more jobs in here?
>
> GARBA: No.
>
> MIKOLAY: So we're shutting down? That's is that what you're basically saying?
>
> GARBA: That depends on everybody here. That depends on how—depends on how productive we are, ah, how reliable we are.

I do not credit Boraski's testimony that the foregoing remarks were made in response to alleged physical threats he had supposedly received. In addition to his unconvincing testimony regarding the alleged physical threats, Boraski never informed the employees that the purported threats related to potential physical harm or that they were made by telephone. Mikolay asked what kind of threat he was talking about, but Boraski did not respond to him. His failure to state the nature to the alleged threats that he had purportedly received, coupled with his threats not to build any more projects in Sandusky, indicate that Boraski was responding not to physical threats, but to an economic threat. Following the meeting, Mikolay went to Boraski's office and again asked him about the threats. Boraski, without referring to the threats, asked Mikolay "who made [him] the spokesman." He then noted that he might have made a mistake by letting Mikolay, who had been injured, return to work on light duty. Mikolay told Boraski that it was he who had called the Union. Boraski told Mikolay to go back to work. Boraski did not state that the Union was not the threat he was talking about. Boraski's questioning Mikolay as to who made him the spokesman reveals that Boraski was not expecting an individual confession to telephone calls; he was expecting a representative of an institution, the Union. He was surprised that it was Mikolay, and he asked who had made Mikolay the spokesman.

The conclusion that Boraski was referring to a threat of unionization is confirmed by examination of his remarks. There would be no reason for Boraski to refer to employees' dissatisfaction with their wages if an unidentified person had stated that he was going to "kick" or "get" Boraski. He did not testify

that the person who allegedly called him made any remark connecting wages to the alleged threat to "get" him. Despite the absence of any mention of wages in regard to the alleged threats, Boraski informed employees that "we said that we would pay you this much, you said fine, we said fine." A physical threat would not prompt a comment about wages. I can find no explanation, other than an economic threat, for that comment followed by the pointed statement, "This is what you call an at will employment. . . . If you don't want to work here the front door is right there and downstairs."

Boraski told the employees three separate times that he would not succumb to a threat of any kind from anybody. Notwithstanding his announced refusal to succumb to any threats, he advised the employees that no current or future orders would be build in Sandusky, an action that would contradict his vow not to succumb to any threats, assuming that the threats were physical rather than economic. If Boraski had received physical threats to which he would not succumb, Respondent would continue to conduct business as usual, with the possible addition of some sort of plant security. The announced intention not to build future orders at the Sandusky plant is inconsistent with Boraski's vow not to succumb to physical threats. It is, however, a consistent response if Boraski were responding to what he perceived as an economic threat, and his reference to wages confirms that he perceived the threat to be economic. Boraski stated that his family had been threatened. Rather than succumb to the threat of unionization of the business at which his family worked, Boraski would remove all work from the unit, thereby depriving the Union of its organizational objective.

The complaint alleges that Boraski's remarks gave employees the impression that their union activities were under surveillance. Consistent with this, the General Counsel and the Charging Party note this alleged violation in their briefs; however, no convincing argument in support of a violation is set forth. I am unable to reconcile an alleged impression of surveillance with the contention that Respondent became aware of employee union activity as a result of open conversations and the display of distinctively colored union literature in the plant on October 30 and 3l. Accordingly, I shall recommend that this allegation be dismissed.

The complaint further alleges that Boraski's suggestion that employees who were dissatisfied working for Respondent should seek work elsewhere violated the Act. The Board has consistently held that suggestions that union supporters who are dissatisfied with their terms and conditions of employment seek work elsewhere violate the Act. *Tualatin Electric*, 312 NLRB 129, 134 (1993). Boraski's reference to employee dissatisfaction and specific directions to the plant door conveyed a clear message: Employees who supported the Union should quit. In so doing, Respondent violated Section 8(a)(1) of the Act.

Boraski's threat not to build current or future projects at Respondent's Sandusky facility constituted a threat of loss of work and, as also alleged in the complaint, impressed upon the employees the futility of seeking union representation and, therefore, violated Section 8(a)(1) of the Act.

Garba's confirmation that Boraski was not going to bring any further work into the plant, together with his response that, whether Respondent shut down depended upon how "reliable" the employees were, constituted threats of loss of work and closure in violation of Section 8(a)(1) of the Act.

E. Alleged Discrimination Against Specific Employees

1. Davin Jones

a. Facts

Davin (D.J.) Jones was Respondent's highest paid welder/fabricator. He was hired at $11.50 an hour on September 15. At a meeting in late September, Boraski complimented the employees upon their work, advised that business was quite good, that this was the time to "buy a car." He specifically complimented Jones, stating, "I wish I had three or four more guys like you, D.J."[3] Jones moved his family to Ohio from Michigan the last weekend in September. Although employees had been requested to work overtime that Saturday, Jones had explained his situation to Garba who removed him from the schedule. On Thursday, October 30, Supervisor Belch asked Jones if he could work over, and Jones responded that he could not, reminding Belch that he had spoken with him earlier, that October 30 was his wife's birthday. Near the end of the shift, Belch told Jones that Garba wanted to speak with him. Jones went to Garba's office. Garba told Jones: "I'm going to have to terminate you." Jones asked what he was being terminated for, and Garba responded, "Absenteeism." Jones asked how that was possible since his wife dropped him off and picked him up every day. Garba mentioned leaving early, and Jones noted that he had never left a regular shift without permission from a supervisor and that, when working on Saturday, when no supervisors or foreman was present, he left with other employees. Jones was shown no document. Jones had no prior disciplinary or corrective action with regard to either performance or attendance.

Jones returned the next day to get his tools. He saw Boraski and asked to speak with him. They spoke in Boraski's office. Jones questioned how he could be discharged for poor attendance, noting that his wife brought him to work and that any time he needed to leave early he had obtained permission. Boraski responded, "You should have thought about that before—before this happened." Jones asked, "[B]efore what happened." Boraski did not respond.

General Manager Garba testified that it came to his attention that Jones had, on a Saturday in October, left work early. Thereafter, he did not specify when, he took it upon himself to review Jones' timecards. Garba acknowledged that he does not normally review employee timecards. The review revealed that on Saturday, October 11, and Saturday, October 18, Jones had worked 4, not 8 hours. Garba did not check the timecards of any other employees who had worked those Saturdays. At the hearing, Respondent offered some, but not all, timecards of employees who had worked on those Saturdays. Garba asserted that he noticed that Jones left on October 11 since only three employees worked, Jones, Gerald Rahm, and Mike Griggs. This was incorrect since employee Joe Theriault was also present. Theriault filled out a report dated October 11 noting that Rahm was late. Griggs, a leadman and the ranking employee, did not report Jones for leaving early, although leadmen did document attendance as reflected by a report from Griggs on October 18 that Rahm reported late and a report from Leadman Matt Stookey on September 23 that Rahm left early. There is no document reflecting that Jones' departure after 4 hours on

[3] Boraski acknowledges stating, "[W]e need three or four people like we hired." I credit the testimony of Jones, Collins, Roberts, Fields, and Pitts that Boraski mentioned "D.J."

October 11 or 18 was improper. After terminating Jones, Garba prepared a memorandum dated October 31 upon which he lists Jones alleged attendance derelictions. In addition to the purported early departures on October 11 and 18, that document reflects one instance of arriving late by 3 minutes on September 25, leaving 33 minutes early on September 20, 5 minutes early on September 26, and 30 minutes early on October 14. No document reflects that any of the foregoing were unexcused. At the hearing, Garba incredibly testified that Jones missed an entire day of work on October 25; however, he neglected to include this date on the list he prepared on October 31. No list was shown to Jones on October 30. Although Garba testified that he consulted with Boraski before terminating Jones, Boraski did not testify to any such consultation.

Boraski testified that he was unaware of any termination for absenteeism when the employee had not missed a complete day of work. Documentary evidence reflects two prior terminations for poor attendance in 1997. Greg Willis, who had been hired on July 8, was discharged on August 4 after missing 2 days of work, leaving early once, and reporting late on three occasions. The file of Mark Milner, who was also hired on July 8, initially reflected that he quit on July 18. The "quit" notation has lines marked through it and the word "discharged" has been written in. Carol Boraski testified that her assistant recorded all cessations of employment as quit, "she put that on all of them;" however, this testimony is incorrect since the document regarding Willis clearly states "discharge" in the same handwriting as the "quit" on Milner's document. Carol Boraski confirmed that she changed Milner's record several weeks after the event occurred, and she acknowledged that she had no personal knowledge of the situation. Milner's timecard does not reflect that he reported to work on July 18. The document prepared by his supervisor reflects that it was prepared a 7 a.m. on July 18, and that Milner was "missing work all the time." Assuming this was a discharge, it occurred after a 3 hour unexcused tardy on July 17 and failure to report at all on the day of discharge, July 18.

b. Analysis and concluding findings

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). I find that Jones did engage in union activity and that Respondent became aware of that activity, possibly by a report from employee Trushell, and certainly through observation of the leaflets that Jones placed on his welding machine. Confirmation of Respondent's knowledge is established by the circumstances surrounding the discharge. The November 4 threats by Boraski and Garba establish animus. I find that the General Counsel has carried the burden of proving that Respondent's animus towards employee union activity was a substantial and motivating factor in the discharge of Jones.

Respondent's discriminatory motivation is confirmed by the timing of the termination and Garba's false testimony that Jones failed to work on Saturday, October 25, a date that he did not record on his postdischarge memorandum. *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Adco Electric*, 307 NLRB 1113, 1128 (1992); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988). Supervisor Belch was unaware of any intent to discharge Jones; he had asked him to work overtime on October 30. The failure of Garba to speak with Jones' supervisor or to confront Jones regarding any specific date establishes the absence of a meaningful investigation. *K & M Electronics*, 283 NLRB 279, 291 (1987). Jones had received no discipline for misconduct or absenteeism at any time during his tenure of employment. No document reflects that any absence was unexcused. Jones was shown no document, and Garba did not prepare his list until the following day. Jones credibly testified that, on the occasions that he left a regular shift, he had permission from Garba. Whenever he left early on Saturday, he left with other employees. The ranking employees who worked on Saturday, including Griggs on October 11, never reported that any action taken by Jones was improper.

Boraski was unaware of any employee terminated without missing an entire day of work. Employee Willis, in less than a month, missed 2 complete days of work and had a continuous tardiness problem. Even accepting the questionable records relating to employee Milner, he was 3 hours late 1 day and was terminated the following day when he did not report at all. Jones attendance had been perfect over the 2 workweeks following October 18. No supervisor ever spoke with Jones regarding any occasion he purportedly left early for the simple reason that he had permission to leave on each occasion. The record establishes Jones did not improperly leave work early on either October 11 or 18. Garba falsely testified that Jones missed work on October 25, a date he did not place on his memorandum.

A complete *Wright Line* analysis is applicable in dual motive cases. When the reason given for an action is either false, or does not exist, the General Counsel's prima facia case is unrebutted, thus, there is no need for further analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). I find that absenteeism, the reason advanced by Respondent for the discharge, was false and a pretext for terminating Jones because of his union activity. Respondent, by terminating Davin Jones because of his union activity, violated Section 8(a)(3) of the Act.

2. Ed Collins and James Roberts

a. Facts

Ed Collins began working for Respondent on December 23, 1996. He applied for the job in response to a newspaper advertisement for welder/fabricators. Collins had previously worked at the Sterling Foundry for 11 years, from which he had been laid off in 1990. At the time he applied for work with Respondent, Collins presented three certificates reflecting his training as a welder. He was not asked to take a welding test. Initially, Collins worked in plant 2, fabricating wash tanks. On April 21, he was made leadman over oven panel fabrication and transferred to plant 1.

James Roberts began working for Respondent on June 9. He had formerly been a foreman at Sandusky Cabinets, but was laid off. He was initially assigned to the shearing machine and then assigned to oven panel fabrication with Collins.

Oven panel production is dependent upon the availability of the materials needed to fabricate the panels. Both Collins and Roberts confirmed that their work was directly dependent upon the parts provided to them by the employees who operated the shearing and breaking machines. At no time were either Collins or Roberts warned or counseled regarding their work. Specifically, there is no evidence that anything was ever said to them regarding a need to produce more panels than they were producing from the materials being provided to them. A few months before their permanent layoff, Boraski had requested that Collins and Roberts build a test panel that was different from the panel Respondent normally built. Boraski commented to Collins that customers had complimented him upon the qual-

ity of Respondent's panels and directed that panels continue to be built according to Respondent's prior specifications. A form dated August 19, reflecting a pay raise to $9.25 an hour for Roberts, includes employee comments. Roberts noted that the panel builders could not get the channels broken, a function performed by the operator of the breaking machine. On a similar form, the operator of the breaking machine, Ron Barron, commented upon a need for new dies and maintenance on machines. Baron was a long-term employee in whom Respondent placed great confidence as reflected by Respondent's requesting him to be present when newer employees were being counseled regarding misconduct.

On October 30, Collins and Roberts gave union literature to the electricians. Collins left literature on his worktable. On November 3, Supervisor Belch told Collins and Roberts not to make any panels. At the end of the day, Garba called Collins and Roberts to his office and stated that, due to rising cost, Respondent was going buy panels from a supplier and that they were laid off permanently. Respondent had never before effected a permanent layoff.

Respondent began building oven panels in 1994. There was no quota, but Plant Manager Tyree expected between 12 and 15 panels a day per employee. Boraski testified that he was dissatisfied with the number of panels being produced and that he discussed this with Garba. Notwithstanding his alleged dissatisfaction, Boraski did not discuss the situation with Collins, Roberts, or Barron. Boraski did not review any documents relating to panel production, despite the evidence that each employee, on a daily basis, filled out a yellow card reflecting what he was working upon as well as any "down time" and the reason. Incredibly, Boraski asserted that he did not even know that this document existed.

Although Boraski testified that he and Garba made the decision to cease producing oven panels, Garba did not testify to having any input into the decision. Garba testified that, in October, he and Boraski noted a decrease in the number of panels being produced and that, as a result of this, a decision was made to monitor the production level. As already noted, Boraski professed ignorance regarding the existence of the yellow production cards. Garba did not testify to the manner in which any purported monitoring of production was carried out, and the record does not establish that there was any monitoring. The employees, in addition to the yellow cards, filled out a sheet reflecting the total number of panels produced each day, but there is no evidence that these were reviewed in October. Even if they had been, that report would be of limited use since, as already noted, panel production was dependent upon parts produced by the operators of the shearing and breaking machines. The absence of evidence of monitoring leads me to find that Garba was not telling the truth when he testified that a decision was made to monitor panel production since I am satisfied that he would have carried out Boraski's instructions if such instructions had been given. Garba did not testify to any discussion of the results of any alleged monitoring, a conversation that would certainly have taken place if there had been any monitoring.

Boraski testified that oven panel production was discontinued because of cost. No documents reflecting cost were reviewed at the time of the decision, and no documents reflecting cost were produced at the hearing. Boraski, when examined regarding the alleged economic basis for the decision to eliminate production of oven panels, incredibly asserted that he was unable to separate the component costs of an oven. The ovens that Respondent fabricates can cost up to $100,000.

On October 23, Collins had submitted an application for vacation at Christmas. It was approved by Garba and Tyree and states that, at the time of the request, Collins did not have a sufficient number of hours to have earned the vacation he was requesting, but that he would have sufficient hours as of the date for which the vacation was requested. Boraski signed his approval of the request on October 30. He testified that the vacation request was approved despite the fact that he was thinking about laying off Collins because he did not "want the line supervisor to know what's going on." I do not credit this testimony. The line supervisor was Belch, but Belch's approval is not on the form. If Boraski had, in fact, been considering discontinuing panel fabrication, he would simply have held this document, which he signed on October 30, for 2 more working days and disapproved it on Monday, November 3, when Collins and Roberts were laid off.

Notwithstanding Respondent's alleged cessation of oven panel fabrication, employee Gerald Rahm was, on several occasion, sent to plant 1 where he built oven panels with Bill Harvey, the shearing machine operator. Boraski admitted that there were two occasions that oven panels were made, and that "other panels" had also been built.

It is undisputed that fabrication of oven panels did require welding. Despite this, Boraski asserted that Collins and Roberts had been hired as general labor and that he did not consider them for other positions because, on the basis of their resumes, neither was qualified as a welder/fabricator. Boraski did not explain why he would rely on resumes rather than observation of Collins and Roberts by himself and his supervisors. Assuming he did rely upon resumes, Roberts' file contains a letter of recommendation from Sandusky Cabinets that notes Roberts had worked on the welding line. Regarding Collins, although a handwritten note by Plant Manager Tyree reports "no welding experience," his file contains three certificates of welding training that Collins presented when applying for work. I do not credit Garba's uncorroborated testimony that a former supervisor told him that Collins had performed poorly on a welding test. Collins credibly testified that he was never given a welding test by Respondent.

Documentary evidence reveals that Respondent paid general laborers, including Greg Willis, who was hired on July 8, and Oliver Blount, who was hired on July 22, $7.50 per hour. Collins had been hired at $8 on December 23, 1996. On December 26, 3 days later, Richard Scheel was hired as a welder/fabricator at the same pay rate, $8 per hour. In October, Collins was being paid $9.50 an hour and Roberts was being paid $9.25. This was more than the $9 per hour being paid to Mark Christini, who was hired as a welder/fabricator on July 21, and comparable to welder/fabricator Jeremiah Pitts who was being paid $9.50 an hour.[4]

Respondent advertised in local newspapers for welder/fabricators on November 1, 2, 3, and 4.

Respondent stipulated that, if it had continued to produce oven panels, there would have been work for Collins and Roberts. Respondent's advertising for welder/fabricators suggests that, even having discontinued oven panel fabrication, there was work for Collins and Roberts. Respondent tolerated lack of

[4] The pay rates of Blount, Christini, and Pitts are reflected on their authorization cards.

skill in other employees as reflected in Boraski's testimony concerning a field installation to which Kyle Perkins and two other employees had been assigned after second shift was discontinued. Regarding this job, Boraski explained, "None of the three knew what an oven was, knew what a conveyor was, or knew even how to install the stuff." Collins and Roberts knew what an oven was.

b. Analysis and concluding findings

In assessing the evidence under the analytical framework of *Wright Line*, I find, as already discussed, that the panel builders, Collins and Roberts, did engage in union activity. I have also found that Respondent became aware of that activity on either October 30 or 31. The record establishes that Respondent bore animus towards employees who engaged in union activity. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor in the permanent layoffs of Collins and Roberts.

Respondent contends that Collins and Roberts were laid off as a consequence of its economic decision to eliminate its panel fabrication operation. There is no probative evidence that Respondent would have eliminated its panel fabrication operation in the absence of union activity by Collins and Roberts. The only alleged basis for elimination of the department was economic, but Boraski was not even able to assert the component cost for panels. Cost is, of course, a function of production efficiency. Despite the testimony of Garba that, after conversation with Boraski, a decision was made to monitor panel production, there is no evidence that such monitoring occurred. As discussed above, I find that Garba's testimony regarding an alleged decision to monitor panel production was not truthful. Thus, the record reflects that two previously model employees, neither of whom had received any warnings and one of whom had been promoted to the position of leadman, were summarily and permanently laid off within 5 days of their attendance at a union meeting. The precipitous nature of this retaliatory action is further established by Boraski's October 30 approval of Collins' Christmas vacation request. Respondent had never previously permanently laid off any employee.

Confirmation of Respondent's discriminatory motivation is established by its failure to consider either Collins or Roberts for any other position. I am satisfied that Respondent did not pay employees for skills they did not possess. Collins worked as a fabricator when he was initially hired on December 23, 1996. He was paid at the same rate as welder/fabricator Scheel who was hired 3 days after him. Collins obviously impressed Respondent and was promoted to leadman in panel fabrication. When terminated he was making the same as welder/fabricator Pitts who had been hired on September 17 and 50 cents an hour more than employee Christini who had been hired as a welder/fabricator on July 21 and was, in November, working as a field installer. Roberts, who was also senior to Pitts and Christini, having been hired on June 9, was making 25 cents an hour more than Christini and 25 cents an hour less than Pitts. Neither Pitts nor Christini had attended the first union meeting.

I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for Respondent's purported elimination of oven panel fabrication. Respondent has not established that it would have taken the same action if Collins and Roberts had not engaged in union activity. *Manno Electric,* 321 NLRB 278 (1996). I find that Respondent permanently laid off Collins and Roberts because they engaged in union activity. In so doing, Respondent violated Section 8(a)(3) of the Act.

3. John Johnson, Bryan Cloud, and Ron Fields

a. Facts

Bryan Cloud was hired as an electrician helper on March 7 by Arnold Kath. Kath knew Cloud because Cloud's mother took care of Kath's children. Ron Fields was hired as an electrician on June 18, and John Johnson was hired as an electrician on July 28. Fields and Johnson performed the wiring on electrical panels used to control the washers, ovens, and other products that were fabricated in plant 2 and, on occasion, would go into the field to install the electrical controls. Cloud assisted at the plant and, on three occasions, was sent into the field to help on installations, twice to Cleveland and once to a customer identified as Autoplex in Belleville, Ohio. Cloud was taking classes at a local community college. Kath told Cloud that he intended to send him into the field during his Christmas break.

Cloud and Fields heard about the first union meeting from Collins, who gave them copies of the literature that had been distributed at that meeting. Cloud placed the leaflets on a shelf in his work area; Fields placed his leaflets in his car. Cloud, Fields and Johnson attended the second union meeting, on October 31, where all three signed authorization cards. The following Monday, November 3, Cloud spoke about the Union with Collins and Roberts, who had been told not to build any panels that day. Cloud also spoke about the Union with electricians John Johnson and Ron Fields, who had attended the meeting with him.

On November 4, following the meeting in which Boraski threatened to cease building any projects in Sandusky, Cloud spoke to his supervisor, Electrical Engineering Manager Arnold Kath, stating his concern about his job. Kath replied, "As long as you guys keep doing what you've been doing, keep producing, putting out work, I have the ammunition to keep you guys on ten hour days, and Saturdays, we have lots of work here."

The third electrician, Thomas Searcy, had been working in plant 2 on a washer and had not been involved in any of the conversations involving the Union with Cloud, Johnson, and Fields. Searcy had previously been suspended after shoving Cloud. Thereafter, he kept notes and reported any action by Cloud that he considered to be improper. Jones had given Searcy copies of union literature, but there is no evidence that Searcy was aware of union meetings that had been attended by electricians. On November 4, following Boraski's meeting in which he referred to threats, Searcy asked Johnson and Fields if they had attended any meetings and they replied that they had. Electrician helper Cloud was present when this occurred. Fields informed Searcy that they had all signed cards, referring to himself, Johnson, and Cloud. Searcy replied that they were crazy, that this was not good idea and left the building, heading in the direction of plant 2 where the management offices were located.

At the end of the workday on November 4, Johnson was called to Kath's office and laid off. As Johnson left Kath's office, Kath called Cloud into his office. Kath told Cloud, "I'm going to have to lay you off." Cloud, having earlier in the day been assured that there was plenty of work, asked what was going on. Kath replied, "Chet had been receiving threats and he said he will not bring any work into this area until the threats stop." He then further explained, "Let's just say both sides are butting their heads, both sides are flexing their muscles right

now. I'm going to lay you off for two weeks. I want you to treat it as a little vacation. Let's let everything cool down, and I'll have you back in here in two weeks."

Kath did not deny having knowledge of the union activities of Cloud, Johnson, and Fields. Nor did he deny telling Cloud that he intended to send him into the field during his Christmas break and assuring Cloud that there was plenty of work for the electricians. Although he asserted that he made the layoff decision because he had only 2 weeks of work over the next 12 to 14 weeks, Kath later testified that he had 2 weeks of work for two electricians, 4 weeks of work for one electrician, and that he typically would "try to keep one guy" in reserve in case the other electrician did not "show up for work." Kath did not deny making the "butting heads" comment. He acknowledged referring to two weeks, testifying, "I told them the possibility, you know, if things pick up—uh, was maybe—uh, very temporary, uh, may be able to have them back within the next two or three weeks." Kath was unable to credibly explain this comment, responding "probably not" when asked if he expected that they would soon be called back. I credit Cloud and find that Kath truthfully told Cloud, perhaps because he knew him outside the workplace, that the layoff was because "both sides are butting their heads," and that the employees would be recalled in 2 weeks, after "everything cool[ed] down."

Things did not "cool down" in the following 2 weeks. As hereinafter discussed, Frank Mikolay began experiencing various difficulties on the job. On November 17, the Union established a picket line in front of Respondent's facility. The employees that Respondent had discharged and laid off, Jones, Collins, Roberts, Johnson, and Cloud were present on the picket line. On a few occasions, Fields ate lunch at the picket line where he talked with Collins, Roberts, Johnson, and Cloud. The picket line was in plain view of the plants. Boraski actually took notes reflecting when Mikolay was on the picket line. Fields was laid off on December 2.

Prior to being laid off on December 2, Fields had spoken with Sales Manager Paul Shaffer, who stated that he could not understand why employees were being laid off, that he "had a lot of work lined up."

Notwithstanding the purported decline in electrical work, Kath did not immediately lay off Fields, who had less seniority than Cloud. Kath explained that Fields, who was senior to Johnson, was retained because service technician Bartlett and Supervisor Mygrant "were involved in numerous field installations . . . [and] were not readily available for a service call or maintenance of any type." Mygrant returned to the shop about a week after Cloud and Johnson were laid off and began performing wiring work in the plant. Fields was sent to Lebanon, Indiana, to correct faulty work by the electric subcontractor.

Boraski testified that the electricians were not engaged in production at the time of the layoff; rather, they were performing indirect labor, which Kath called "busy work." Respondent's records reflect that, in the three weeks prior to the layoff, Searcy performed 31 hours of overtime, Fields performed 6 hours of overtime, Johnson performed 7.8 hours of overtime, and Cloud performed 12 hours of overtime. The foregoing figures reveal, consistent with the testimony of Cloud and Fields, that the electricians were performing production work. I am satisfied that Respondent would not have paid overtime to electricians for "busy work."

During the period from November through January 1998, Respondent hired Wendell Joseph, a former electrical supervisor who had retired, on a contract basis as Respondent's project manager at the installation of a project identified as Metokote. Respondent presented no evidence that Mygrant would not have performed this function had he not been performing wiring work at Respondent's facility.

Documentary evidence reveals that following the layoff of Cloud and Johnson, Respondent began subcontracting electrical installation work, chiefly to Bodie Electric. In the 6-month period from June through November 21, Bodie had performed three installations for Respondent at a total cost of $32,812. During the next 2 months, from December 8 through January 25, Bodie performed five installations at a total cost of $35,209.25. Respondent presented no evidence establishing that Cloud, Johnson, and Fields could not have performed this work. Although Kath testified that Johnson had no driver's license, he acknowledged that he observed him drive himself to work in his van. Respondent presented no evidence from any official source revealing either revocation or suspension of Johnson's license. Fields credibly testified that Johnson and Cloud were capable of performing the work he was sent to perform in Lebanon, Indiana. Kath did not contradict this testimony.

Fields was recalled on February 23 when Searcy quit. Dan Malloy, who had previously been employed by Respondent as an electrician, was rehired as a supervisor on the same day. For the first few weeks, Malloy performed the same work as Fields. Malloy was also sent out on installations.

b. Analysis and concluding findings

Cloud, Johnson, and Fields all engaged in union activity, signing authorization cards at the second meeting. I find that Respondent learned of this on November 4, after Fields spoke to Searcy. Immediately following Boraski's meeting, Kath had assured Cloud that there was sufficient work for the electricians notwithstanding Boraski's threats. Cloud and Johnson were laid off that very afternoon. Kath never denied having knowledge of their union activity or, when promising recall after 2 weeks, referring to the "two sides" butting heads. This reference confirms that Respondent had learned that Cloud and Johnson were on the wrong "side."

Respondent's animus is confirmed by Kath's repeat of Boraski's threat not to bring in any work until the "threats" stopped. This repeated threat violated Section 8(a)(1) of the Act.[5]

The threat of unionization did not stop. The Union established a picket line upon which Cloud and Johnson appeared. They were not recalled after 2 weeks because things did not "cool down." Despite his retention, Fields visited the picket line a few times, talking with Cloud and Johnson. In so doing, he exhibited his continuing solidarity with his former coworkers and the Union. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor in the layoffs of Cloud, Johnson, and Fields.

Respondent has not established that these employees would have been laid off absent their union activity. Both Johnson and Cloud had worked overtime during the week immediately preceding the layoff. Respondent's sales manager commented to

[5] The General Counsel adduced no evidence regarding an alleged threat of loss of overtime by Kath. The General Counsel has moved to withdraw all allegations of alleged threats by Kath purportedly made in telephone conversation on November 4 upon which no evidence was adduced. The motion is granted.

Fields that he did not understand why employees were being laid off in view of the work that he was aware needed to be performed. The record establishes that Johnson and Cloud continued to be needed and that Respondent had to make various arrangements to assure that the work that they would have performed was accomplished. Fields was not laid off simply because his presence was absolutely essential. Respondent could operate without one electrical and one helper while making arrangements to cover those vacancies, but operating without two electricians was impossible. Bartlett and Mygrant were not available to Kath on November 4. The following week, Mygrant was moved to the shop. Thereafter, Respondent hired Joseph on a contract basis to supervise an installation. Respondent presented no evidence that Mygrant could not have served as project manager for this installation. Respondent also subcontracted installations to Bodie Electric. There is no evidence that Johnson, Fields, and Cloud were incapable of performing this work. By early December, Respondent had made sufficient arrangements so that it could rid itself of the remaining union adherent in the electrical department. It did so by laying off Fields on December 2.

Respondent, having laid off rather than discharged these employees, was placed in the position of having to recall them when Searcy and Mygrant left its employment in February. Respondent recalled Fields. Rather than recall union adherent Johnson, Respondent hired former employee Dan Malloy as a supervisor.[6]

Respondent has not rebutted the General Counsel's evidence that union activity was a substantial and motivating factor in the layoffs of Cloud, Johnson, and Fields. The evidence presented in Respondent's attempt to establish that the layoffs were economically motivated underscores the lengths to which Respondent went to rid itself of these union adherents. I find that the layoffs of Cloud, Johnson, and Fields, the failure to recall Fields until February 23, and the failure to recall Cloud and Johnson, were motivated by the union activity of these employees. Their layoffs and the failure to recall them violated Section 8(a)(3) of the Act.

4. Frank Mikolay

a. Facts

Frank Mikolay began working for Respondent as a welder/fabricator on May 20. It was he who contacted the Union, as he told Boraski in the conversation on November 4 in which Boraski asked Mikolay who had made him the spokesman.

Shortly after this conversation, Mikolay's worktable was moved to a position approximately 12 to 15 feet in front of Supervisor Mike Belch's office. Belch directed Mikolay to work at the relocated table. Thereafter, Mikolay noted that Belch was regularly observing him through the office window. Belch told Mikolay not to talk to anybody, and, on one occasion, when Mikolay went to obtain assistance from another employee, directed him to return to his worktable.

On November 6 Mikolay left work for a doctor's appointment. There is no evidence that he received permission to leave, and Mikolay testified only that he "told them I had an appointment," without identifying "them." On November 10 he was warned for leaving work without proper authorization.

Mikolay had been convicted of driving under the influence in August and sentenced to 3 days in jail. The sentence was to be served at an undetermined future time. Mikolay reported this to Garba, asking if this would present a problem as far as his job was concerned. Garba assured him that it would not. Mikolay was directed to serve the 3 days beginning on November 7. He informed Respondent of this in late October. After serving his 3 days and being released on November 10, Mikolay reported to work. He was given a warning for leaving on November 6 and a second warning for missing work on November 7 and reporting late on November 10. Both warnings threatened suspension if there was a further offense.

Mikolay became concerned regarding the treatment he was receiving, and he made an appointment to consult with legal counsel. On November 12, he told Belch that he had an appointment, but he did not divulge the nature of the appointment. Belch asked Mikolay where he was going, and Mikolay asked if the absence would be excused if he told him. Belch said, "Yes," and Mikolay reported that he was going to see an attorney. As Mikolay was leaving, he sought to confirm that the absence would be excused. Belch informed him that it would not be excused. Despite this, Mikolay went to the appointment, returning with a letter confirming that he had been where he said that he was going. Mikolay was not disciplined.

On November 13, Mikolay spoke with Personnel Director Carol Boraski regarding what he described as a stress problem. He felt he needed to see a psychiatrist and that his evaluation and treatment should be paid for by workers compensation. In this regard, he explained that the stress he felt was work related because of the things that were happening to him because of the Union. Carol Boraski testified, but Mikolay denies, that he stated that he "felt like he was going to explode and did not want to 'lose it' on the job."

Although I am satisfied that Mikolay attempted to testify truthfully, there were several occasions when his memory deserted him and he simply did not respond to questions that were asked. His own notes regarding his feelings of stress refer to "pressure from management" due to his union involvement. In view of his mental state at the time he spoke with Carol Boraski, I find that she, rather than Mikolay, is the more reliable reporter of the events of November 13. I credit her recollection which is recorded on a memorandum she prepared following her conversation with Mikolay.

Carol Boraski provided Mikolay with a workers compensation form. Mikolay left the plant at 10:35 a.m. He did not work on Friday, November 14. On Monday, November 17, Mikolay reported to work without any evidence that he had received treatment for his stress problem. Respondent presented him with a letter signed by Tyree stating that, in view of his statement to Carol Boraski that he was "ready to explode," Respondent was unwilling to permit him to return until he provided a detailed report from his doctor. The letter noted that it was taking this action for Mikolay's safety "and the safety of the other employees."

Mikolay was evaluated by a psychiatrist on December 2. The psychiatrist gave him a short note stating that Mikolay was under his care and "may return to work without restriction" on December 4. Mikolay returned to the plant with the note on December 4. Plant Manager Tyree met with Mikolay and told him, as he had stated in the letter of November 17, that Re-

[6] This action did not constitute a unilateral change in violation of Sec. 8(a)(5) of the Act as alleged in the complaint since supervisors had regularly performed unit work in the past.

spondent was unwilling to permit him to return until he provided a "detailed report" from his doctor. Respondent stipulated that this was the only occasion upon which it had required a detailed report. Mikolay obtained a detailed report that states that he had no "acute psychiatric pathology" that would preclude him from working. Mikolay gave this to Boraski on December 17, and Boraski told him to report to work the following day.

On December 18, upon reporting to work, Mikolay was given a memorandum outlining Respondent's expectations of him. It stated that there were to be no outbursts or disruptions and an admonition not to "bother other employees." The admonition not to "bother" was coupled with a threat that, if Belch received complaints from employees, Mikolay would be disciplined.

In late December, Mikolay received permission from Belch to leave work because he was ill. When he returned to work, Belch demanded that he produce a doctor's excuse. Mikolay questioned why he needed an excuse since he obviously had become sick at work. Belch replied that "some people" were required to have an excuse and that Mikolay was one of them.

On January 2, Boraski came into the plant where Mikolay was working with Dave White. Boraski told Mikolay that he had been watching him "for a while" and that he had not "done a damn thing." Boraski did not deny this comment. He acknowledges that Supervisor Belch called him and reported that Mikolay was "agitating everybody in the plant, and the employees was complaining to Mr. Belch." Boraski suggested a more efficient way for Mikolay to perform the work he was doing. Regarding Belch's contacting him regarding Mikolay, Boraski testified, "He just wanted to advise me, yes. It's a close—it's a small company."

On January 3, shortly before the shift was to end, Mikolay informed Belch that his heel was hurting and, therefore, he was leaving. Belch did not direct Mikolay to stay, and he admitted that, after Mikolay stated that he was in pain and was leaving, he said nothing. Mikolay came to the plant on January 5, but did not work, ostensibly due to continuing foot pain. Mikolay was unable to recall the conversation he had at the plant on January 5. He received no discipline that day. On January 6, he returned with a doctor's excuse indicating that he had been treated on January 6 and would be unable to work from January 6 through 21. Respondent issued Mikolay a 3-day suspension effective January 5 through 7, for "leaving your shift early" on January 3. It appears that Mikolay received a further medical leave after January 21. Mikolay is no longer employed by Respondent.

b. Analysis and concluding findings

(1) The 8(a)(1) allegations

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of Mikolay's union activities on November 4, threatening not to excuse a previously excused absence in November, ordering Mikolay not to talk to another employee on December 18, disparately treating him regarding the need for a doctor's excuse on December 30, and engaging in surveillance on January 2.

The General Counsel correctly argues that the moving of Mikolay's worktable on November 4 did not constitute surveillance, but more closely monitoring. Respondent, in its brief, suggests that this occurred after Mikolay was released by the psychiatrist, but there is no evidence to support this suggestion. Belch did not deny that it occurred on November 4, shortly after Mikolay told Boraski that he had contacted the Union. Respondent's unlawful monitoring of Mikolay is confirmed by his unrebutted testimony that Belch directed him to return to his table when he attempted to ask another employee for assistance. Thus, Mikolay was not only more closely monitored, he was also isolated from other employees. This conduct violated Section 8(a)(1) of the Act.

Respondent does not address the occasion in the second week of November when Mikolay sought permission to contact his attorney, was initially granted permission, but then informed by Belch, as he was leaving, that the absence would be unexcused. Although Respondent did excuse the absence, thereby avoiding a violation of Section 8(a)(3), Mikolay's unrebutted testimony concerning Belch's threat not to excuse this previously excused absence, especially considering that Mikolay had been threatened with suspension on November 10, constituted restraint and coercion in violation of Section 8(a)(1) of the Act.

Regarding the direction not to talk to another employee, the General Counsel cites the restrictions placed upon Mikolay upon his release for work by the psychiatrist. Belch provided Mikolay with a set of expectations. The requirement that Mikolay was not to "bother other employees" was coupled with a threat of discipline if any other employee complained to Belch. Respondent argues that the expectations were in response to alleged disruptions that Mikolay had caused prior to November 17, none of which it documented and none of which resulted in discipline to Mikolay. Respondent does not specifically address the "bother other employees" restriction which promises discipline upon complaint by an employee, rather than evidence of misconduct by Mikolay. This restriction, which certainly would preclude Mikolay from talking favorably about the Union to an antiunion employee who would be bothered by his comments, unlawfully restricted talking with other employees and violated Section 8(a)(1) of the Act.

Respondent presented no evidence that any employee, other than Mikolay, had ever been required to provide a doctor's excuse in order to return to work after receiving permission to leave work when that employee became sick on the job. Belch did not deny the conversation in which he responded that an excuse was required of "some employees." This requirement imposed upon the leading union adherent remaining in Respondent's workforce constituted harassment and violated Section 8(a)(1) of the Act.

The allegation that Boraski engaged in surveillance on January 2 arises from the occasion upon which Boraski told Mikolay that he had been observing him and that he had not done a "damn thing." The evidence does not establish surveillance. It does establish another incident of more closely monitoring the leading union adherent in the plant. If it were true that Mikolay was agitating everybody, Mikolay would have been disciplined pursuant to the prohibition against disruptions given to him on December 18. Belch, upon observing Mikolay doing something that he deemed inappropriate, immediately brought the matter to Boraski's attention rather than dealing with it himself. This incident reconfirms that Respondent was continuing to more closely monitor union adherent Mikolay, as it had been doing since November 4, in violation of Section 8(a)(1) of the Act.

(2) The 8(a)(3) allegations

The complaint alleges violation of Section 8(a)(3) of the Act regarding the two warnings issued to Mikolay on November 10

and his suspension in January, as well as the refusals to allow Mikolay to return to work on November 17 and December 4.

The record establishes Mikolay's union activity and Respondent's knowledge of, and animus towards, that activity. Thus, the General Counsel has established that disciplinary action against Mikolay was motivated by his union activity unless Respondent adduces evidence that the same action would have been taken in the absence of Mikolay's union activity.

With regard to the warning for leaving work on November 6 for a doctor's appointment, Mikolay testified, "I told them I had an appointment," without identifying "them." The warning states that Mikolay left work without proper authorization. The General Counsel has not established that Mikolay either notified supervision or received permission to leave work. There is no evidence of disparity. I shall recommend that this allegation of the complaint be dismissed.

Regarding Mikolay's November 10 warning for missing work due to his incarceration, Garba had told Mikolay that this would not affect his job. Respondent suggests that Mikolay did not inform Respondent when he would be absent, citing his testimony that he could not recall whom he notified when he learned the specific days that he would be in jail. The warning states that Mikolay missed work due to incarceration, thus confirming that Respondent was aware of his upcoming absence and the reason for it. The warning is for the absence, an absence Garba excused. By warning a leading union proponent for an absence that its general manager had excused in advance, Respondent violated Section (8)(a)(3) of the Act.

On November 17, the first time that Mikolay had appeared at the plant after his conversation with Carol Boraski on the morning of November 13, he had no document indicating that he had been treated for the stress that he had described to her. Both the General Counsel and the Charging Party argue that Respondent treated Mikolay discriminatorily by requiring an unprecedented "detailed report" before permitting him to return to work. With regard to November 17, this argument begs the question since Mikolay had no document at all.

Respondent concedes that the requirement for a detailed report was unprecedented, and notes that the situation presented by Mikolay was also unprecedented. The General Counsel argues that Mikolay was treated disparately compared to leadman Matt Stookey who acknowledged having a substance abuse problem and whose absences were excused, ostensibly without a detailed report. I find Stookey's situation inapposite. Stookey never advised Respondent that he "felt like he was going to explode and did not want to 'lose it' on the job."

Mikolay was not permitted to return to work on December 2 when he presented a one sentence release statement. The statement made no reference to Mikolay's reported stress problem or concern that he might "lose it." In view of the potential liability if Respondent had returned Mikolay to the job and he had "exploded," I find Respondent's caution totally justified. I am mindful that Respondent had already singled out Mikolay by moving his worktable and issuing him an unlawful warning. Despite this, I simply cannot find that Respondent's refusal to return him to work without a detailed statement from a mental health professional was discriminatorily motivated. Mikolay presented the detailed report that Respondent had requested on December 17, and he returned to work on December 18. I shall recommend that the allegations that Respondent unlawfully refused to permit Mikolay to return to work on November 17 and December 4 be dismissed.

It is undisputed that Mikolay informed Belch that he was leaving work because of pain in his heel shortly before the shift ended on January 3. In testimony, Belch implied that discipline was issued because Mikolay informed him that he was leaving rather than asking permission to leave; however, Belch said nothing to him. Insofar as silence constitutes assent, there is no reason that Mikolay believed that he was leaving without authorization. The discipline issued to Mikolay does not state that he left without permission or was insubordinate; it simply states the he was being suspended for "leaving your shift early." I find this suspension to be pretextual. Any ambiguity regarding Respondent's unlawful motivation is dispelled by the evidence that Respondent imposed this 3-day disciplinary suspension upon Mikolay on 3 days when Respondent was aware that Mikolay was physically unable to work. I find that the January 6 suspension of Mikolay violated Section 8(a)(3) of the Act.

5. Jeremiah Pitts

a. Facts

Jeremiah Pitts worked for Respondent as a welder/fabricator from September 15 until April 5. He signed a union authorization card at the second union meeting. After the picket line was established on November 17, Pitts visited with the employees on the line during his lunchbreak. Later during the organizational campaign, he began wearing a hat and shirt identifying him as a supporter of the Union.

Shortly before the election Pitts was talking with fellow employees Bill Montgomery and Dan Rogers, who both expressed the opinion that if the employees selected the Union as the employees' collective-bargaining representative that Boraski would close the plant. Boraski was walking by the employees as this occurred. Pitts' stopped him and asked how he felt about Montgomery and Rogers answering for him. Without responding to Pitts, Boraski addressed Montgomery stating, "Bill I can't really respond on that." He then rhetorically asked, "Do you really think I need the headaches and aches and pains of this? This is just a business that I just—I just do it. Do you really think I need all this?" Boraski testified that he had no recollection of a conversation involving Montgomery, Rogers, and Pitts. He denied making a headaches comment or threat to close the plant to Pitts. Whether Respondent intended this to be a denial of the comment Boraski made to Montgomery, the individual that Boraski was addressing, is immaterial since I credit Pitts.

On another occasion, Belch, in the presence of Kyle Perkins, stated that he wanted Pitts to tell the union to "f— off," that he wanted Pitts to know the facts, that Pitts was a follower and that he wanted Pitts to get the story straight and "vote no." Belch slammed his fist down for emphasis during this conversation in which he went on to state that "the doors would not be opened if the Union came in the shop. The company would shut down." Belch denied the "f— off" comment and threat of closure, but did not deny slamming down his fist or telling Pitts to get the story straight and vote no. I credit Pitts.

Shortly before the election, Pitts spoke with Perkins who, during October and November, oversaw the work performed on the short-lived second shift. Perkins stated that, since he had been demoted, he could vote in the election. Pitts replied that after the election he expected that Perkins would be promoted to supervisor, and that Perkins responded, "Yeah, probably." There is, however, no evidence that Perkins has been promoted from leadman.

Right around the time of the representation election, Pitts was assigned to buff the metal panels on a large washer tank. He explained that this was tedious work. He acknowledged that two other employees, both of whom were also welder/fabricators, Dan Rogers and Chris Wade, were also assigned to buff, "There was a lot of buffing to do." Pitts states that, as he was working, both Belch and Tyree told him to buff one panel every hour and a half. Tyree acknowledged that he assigned Pitts and others to buffing, that Respondent was behind schedule on a washer that was being completed section by section. He observed that it took about an hour and a half to properly buff a 9 foot by 42-inch steel panel and he advised the employees doing the buffing of this. He testified that if they were going faster they may not be doing a "nice job" and that to go slower was unnecessary. There is no evidence that any records reflecting the time spent per panel were kept and no sanction was established for deviation from Tyree's suggestion.

b. Analysis and concluding findings

When Pitts asked Boraski if he was going to let Montgomery speak for him, Boraski did not disavow the statements of Montgomery and Rogers regarding their belief that he would close the plant if the employees selected the Union. His rhetorical comments, concluding by asking Montgomery, "Do you really think I need all this?" effectively confirmed that he did intend to close the plant if the employees selected the Union. By threatening plant closure, Boraski violated Section 8(a)(1) of the Act.

Similarly, Belch's statement that "the doors would not be opened if the Union came in the shop[;]. . . . [t]he company would shut down," constituted a threat of closure in violation of Section 8(a)(1) of the Act. The Charging Party argues that Belch's remark that Pitts should get the story straight and "vote no" violated the Act and was objectionable conduct separately from the threat of closure. The complaint does not allege the "vote no" comment as a violation of Section 8(a)(1). Statements by supervisors to "vote no," standing alone, do not violate the Act or constitute objectionable conduct. *Montfort of Colorado*, 298 NLRB 73, 184 (1990).

The record establishes Pitts' union activity, Respondent's knowledge of that activity, and animus towards union activity. Notwithstanding the foregoing, there is no probative evidence that the assignment of buffing was discriminatorily motivated. Pitts' candid and credible testimony establishes that employees Rogers and Wade were, like Pitts, assigned buffing duties. Although Wade signed a card, there is no evidence that Respondent was aware of his union activity, and he is not alleged as a discriminatee. There is no evidence that Rogers engaged in any union activity. The assignment of these three employees was dictated by Respondent's production needs. Respondent was behind schedule on the washer. I note that this might not have been the case if Respondent had not terminated Jones, Collins, and Roberts. Tyree's direction to buff each panel for an hour and a half did not establish a production quota. There is no evidence that any record was thereafter maintained regarding the time each employee spent per panel and no disciplinary action of any kind was either threatened or administered. If Respondent had imposed a quota, it would have instituted some procedure for assuring compliance with the quota. Tyree's comment was a supervisory direction regarding the most efficient manner by which to accomplish the job assignment. I shall recommend that this allegation of the complaint be dismissed.[7]

6. Gerald Rahm

a. Facts

Rahm was hired as a welder/fabricator on December 26, 1996, and worked until his termination on March 11, 1997. He signed an authorization card at the second union meeting and regularly visited the picket line after it was established on November 17.

On a Sunday in mid-November, employees Rahm and Trushell were working. They became involved in a conversation regarding the Union with Rahm advocating the Union and Trushell opposing it. Trushell suggested that they speak with Boraski, who had walked into the plant. In Boraski's office, Trushell continued to speak against the Union. Rahm stated that he did not want the employees to lose their jobs. Boraski took a set of keys from his office, held one up and asked Rahm if he knew what it was. Rahm replied that it was a key, and Boraski asked, "A key to what?" Rahm responded, "The building." Boraski stated, "That's right, and I can close it and move it anytime I want to." Boraski claims that the Union was not mentioned in this conversation, that Trushell only spoke about the "atmosphere in the plant," which he attributed to the employee with the bad leg, thereby identifying Mikolay.

Although all parties briefed this issue as if it occurred on November 2, prior to the November 4 meeting, I note that the complaint places it in mid-November, and that Rahm initially testified that it occurred in mid-November. Although Rahm did mention the date November 2, he immediately testified that he was not certain of the date. When asked about this meeting, counsel called Boraski's attention to November 2; Boraski did not independently place the conversation on that date. If it did occur on November 2 and if Trushell talked about the atmosphere in the plant, the failure of Boraski to mention the alleged threatening telephone calls he had purportedly been receiving is further evidence that such calls were not received. I find it unlikely that the conversation occurred on November 2, since Rahm was clearly concerned about jobs, an issue that became a concern after the terminations and Boraski's threats at the meeting of November 4. Regardless of when the conversation occurred, I credit Rahm's testimony regarding what was said.

In mid-January, Rahm was using the telephone in Supervisor Belch's office. Belch, talking to Leadmen Mike Griggs and Kyle Perkins, stated, in a loud voice, that "even if the Union does come in here . . . nobody would stand a chance," mentioning that he documented "everything." Belch did not deny making this comment.

The day before the election, Garba spoke with Rahm soliciting his support. Garba reminded Rahm that Respondent had supported him in the past, a reference that Rahm understood to refer to an occasion when he had been suspended rather than terminated after having drunk an alcoholic beverage at lunch when he was on a job. Respondent had also permitted Rahm to leave early to attend school throughout the fall. Garba noted that as a result of experience that Rahm would be more valuable than a person with just education or only hands on experience. Rahm testified that Garba stated that, after Rahm got his degree, he "could stand a good chance" of working as an engi-

[7] Insofar as I have found that no production quota was instituted, there was no unilateral change in violation of Sec. 8(a)(5) of the Act.

neer. It is clear that Garba suggested to Rahm that, as a result of education and experience, his future with Respondent was bright; however, ever Rahm's recollection of the conversation does not tie his advancement to his support for Respondent. The controlling factor was getting his degree.

Following the election, Rahm advised Belch that he was seeking other employment. When Belch questioned why, Rahm responded that he wanted a clean start, an apparent reference to his less than pristine disciplinary record.

On January 28, Rahm again spoke with Belch. Belch told him that "some people had been talked to about signing affidavits to the Union," and that he knew Pitts was one of them. Belch asked if Rahm also was one of them. Rahm replied that he did not know what Belch was talking about. Belch then told Rahm, if he was contacted by any union members about signing any affidavit, "[T]o tell them that I didn't want nothing to do with them . . . the Union was over." The Union, at this time, was obtaining evidence in support of its objections to the election. Belch did not deny this conversation or these remarks. Rahm did not inform Belch that he gave an affidavit to the Union, and there is no evidence that Respondent was aware that he did so.

A couple of days following this conversation, Rahm testified that Belch allegedly told him that he was giving him a clean start; however, this testimony is inconsistent with his further testimony that Belch threatened that he could fire him because he "had everything in black and white." In view of the internal inconsistencies in these remarks, together with Belch's testimony that he told Rahm that he could obtain a clean slate simply by starting to come to work on time, I do not credit either Rahm's testimony that Belch told him that he had been given a clean start or that Belch threatened him with termination.

Rahm's attendance record, although not exemplary prior to December 1997, was not unacceptable. He was attending a local community college, thus he often left work early, but these departures were excused. He did not have a full day unexcused absence in 1997.

On December 1, Rahm was verbally warned for insubordination. He received a written warning for insubordination on December 2. In addition, Rahm was late on three occasions that were unexcused and received a written warning dated December 23 advising that future incidents of tardiness or absenteeism would result in a 3-day suspension. None of the foregoing warnings are alleged as discriminatory. In January 1998, Rahm was late twice and did not call in on either occasion. He also missed 2 days due to illness. In February 1998, he reported to work late twice without calling in, but received no further discipline. On March 2 Rahm did not report to work or call in. On March 3, when Rahm reported to work, he was questioned about March 2, and he replied that he just did not come in and did not know why he did not call.

On March 6, Boraski, Garba, Tyree, and senior employee Ron Barron met separately with Rahm, Matt Stookey, and Jeremiah Pitts regarding their attendance. Pitts received a verbal warning that is not alleged as discriminatory in the complaint.[8] Stookey received no discipline. Stookey had a substance abuse problem that he brought to Respondent's attention and for which he began receiving treatment. Rahm had no explanation for either his failure to report to work or call in. He was issued a 3-day suspension, effective March 9, 10, and 11. Monday through Wednesday. When Rahm was told he was being suspended for 3 days, he mentioned that he was "99 percent sure that he would be leaving and taking another job." Boraski asked if he was giving notice, and Rahm replied that he was. Immediately following the meeting, Rahm asked Plant Manager Tyree if he had to work Saturday, and Tyree replied that he did, to look at his suspension, it was for Monday through Wednesday.

Rahm testified that, in the meeting but after he had been suspended, Boraski commented that he would see him on Thursday. When asked if he recalled asking Tyree whether he had to work overtime, Rahm responded, "No. I would have just not worked it." Insofar as this response be considered a denial of the conversation with Tyree, I do not credit it. Rahm's eagerness to deny a question that had not been asked was apparent and is reflected in the transcript. Boraski's comment about seeing Rahm on Thursday establishes nothing. It could reflect Boraski's plans to be absent on Saturday or an offhand remark that did not take the Saturday work schedule into account. Assuming it may have left Rahm with a false impression, Tyree corrected any such false impression by confirming with Rahm that he was to work on Saturday and begin his suspension on Monday. Rahm testified that other employees had failed to report or call in and were not disciplined. He did not identify any employee by name. The General Counsel adduced no evidence that any employee who had recently been warned was treated differently from Rahm. I do not find that Respondent's treatment of Stookey constitutes evidence of disparate treatment. Stookey had acknowledged a substance abuse problem and Respondent made an accommodation for him, just as Respondent accommodated Rahm's early departures in order to attend school. The General Counsel's reference to employee Gentle Philon's 1997 attendance record does not establish disparity since his disciplinary record was not introduced into evidence, nor is there any evidence relating to his attendance in 1998.

Rahm did not report to work or call in on Saturday, March 7. When he reported on Thursday, March 11, he was terminated. On an exit form with spaces reflecting the reason for leaving, "better job" is checked. Rahm did not recall making the check. All parties agreed that Rahm was terminated, thus, whether Rahm did or did not give notice on March 6 or check "better job," is irrelevant. I credit Tyree's testimony that he did not call Rahm on Monday and terminate him because "I don't handle those things by phone."

b. Analysis and concluding findings

In mid-November, Boraski, using the keys to the plant to emphasize his remarks, threatened to close or move the plant in response to the employees' organizational activity. This threat of closure and loss of jobs violated Section 8(a)(1) of the Act.

In mid-January, Belch stated that employees would not "stand a chance" if they selected the Union as their collective-bargaining representative because of the manner in which he documented "everything." I find that this statement implied that the employees' organizational efforts were futile and violated Section 8(a)(1) of the Act.

Garba's conversation with Rahm the day prior to the election regarding Respondent having supported him in the past and his

[8] The General Counsel's brief notes the warning to Pitts and states that it "would also be violative of the Act under the circumstances." This warning was disclosed in the presentation of Respondent's case. It is not alleged in the complaint and there was no motion to amend.

standing a good chance of working as an engineer after he got his degree is not alleged in the complaint as a violation of the Act. The Charging Party contends that it constituted objectionable conduct. I find no unlawful promise of benefit since the predicate for any possible advancement was the obtaining of a degree rather than support of Respondent in the election.

Belch's undenied interrogation of Rahm regarding whether he had given an affidavit to the Union, when the Union was obtaining evidence in support of its objections to the election, and his direction that, if asked to give an affidavit, to refuse to do so, were coercive and violated Section 8(a)(1) of the Act.

This conversation is the predicate for alleging Rahm's suspension and discharge as violations of Section 8(a)(4) of the Act. As noted above, Rahm informed Belch that he did not know what he was talking about. There is no probative evidence that Respondent learned that Rahm had given an affidavit.

Rahm had signed a union card and regularly visited the picket line. Respondent was aware of Rahm's union sympathies. Respondent's animus is amply demonstrated by the record. Thus, under *Wright Line,* the issue is whether Respondent would have discharged Rahm in the absence of his union activity.

Unlike Davin Jones, who had never missed an entire day of work and had received permission whenever he left early, Rahm had missed entire days of work and had reported late without calling in. Jones had never been warned, much less suspended, because of attendance. Rahm had been twice warned for insubordination in December and, on December 23, had been warned for absenteeism and threatened with a 3-day suspension. Thereafter he missed 2 days due to illness and on March 2 simply did not report for work. The warning and threatened suspension issued to Rahm on December 23 is not alleged as discriminatory. Rahm was not disciplined for missing work on the days he was ill, nor was he disciplined when he was late for work twice in January and twice in February without calling in. He was not suspended until he did not report to work and did not call in on March 2. When questioned about why he had not reported or called in, Rahm had no explanation. There is no evidence that Respondent has not imposed a suspension when an employee who had previously been warned regarding attendance failed to report without calling in.

Despite having been counseled regarding attendance, suspended for 3 days, and specifically told by Plant Manager Tyree to report to work on Saturday and begin his suspension on Monday, Rahm did not report for work or call in on Saturday. Contrary to the General Counsel, I do not find that the treatment afforded Stookey establishes disparate treatment. Stookey advised Respondent of his substance abuse problem. Rahm had been issued a nondiscriminatory warning in December, he had no cogent explanation for his failure to either report to work or to call in on March 2, and he ignored Tyree's reminder that he was to work on Saturday, March 7. I find that Respondent would have terminated Rahm irrespective of his union activity. I shall recommend that the allegations relating to the suspension and discharge of Rahm be dismissed.

F. Additional 8(a)(1) *Allegations*

1. Statements relating to bargaining negotiations

Boraski held various meetings with employees throughout the organizational campaign. His comments at these meetings were not recorded, and he had no written text. Boraski testified that his remarks were based upon the written materials that Respondent distributed to employees, that he would go over the materials and invite questions. Rahm testified that Boraski stated that employees would be forced to work for less than they already had, and Pitts testified that Boraski stated that negotiations would start from ground zero, and the employees would work under the rate he set. Boraski admits stating, "[W]henever you bargain with the Union . . . you start at zero, you don't start where you're at right now, you don't start with your existing wages, you don't start with your existing benefits, you start at zero."

"When an employer makes a statement that can be understood as a threat of loss of existing benefits and employees are left with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore," the employer has violated Section 8(a)(1) of the Act. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980). Boraski's admitted statement, consistent with the testimony of Rahm and Pitts, advised the employees that by selecting the Union as their collective-bargaining representative, they would lose existing benefits, that "you don't start with your existing wages . . . you start at zero." Respondent's statement, as alleged in the complaint, threatened the loss of existing benefits and the futility of negotiations in violation of Section 8(a)(1) of the Act.

2. Document referring to enforcement of rules

After the advent of the Union's organizational campaign, Respondent distributed various pieces of literature to employees. One of these documents sets out three expectations: that employees report to work every day, do a good job, and "follow the company rules and procedures." The document states that Respondent had these expectations prior to the Union. It then states that, with a union, the Company would have the same expectations and, in addition, employees will be required to "follow the company rules and procedures to the letter."

The complaint alleges this as a threat that Respondent's rules would be more strictly enforced if the Union were successful. Respondent cites *Tri-Cast, Inc.*, 274 NLRB 377 (1985), a representation case in which the Board held that advising employees that selection of a union alters certain aspects of the employment relationship does not constitute objectionable conduct. Respondent argues that, under that standard, the comment regarding following rules and procedures to the letter is protected speech and not a threat. I disagree. In *Tri-Cast*, the employer stated that it would not be able to freely respond to personal requests, but would have to run things "by the book." The Board held that this constituted a permissible explanation regarding the changed aspect of relations if the employees selected the union as their 9(a) representative. In the instant case, Respondent advised the employees that it had always expected them to obey its rules and regulations, but, if they selected the Union, the Respondent would require obedience "to the letter." This constituted an impermissible threat of more strict enforcement of plant rules and polices and violated Section 8(a)(1) of the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 495 (1995); *United Artists Theatre*, 277 NLRB 115, 121 (1985).[9]

[9] This document was identified by Fields, who was laid off on December 2. It was, therefore, published before the representation petition was filed on December 4.

3. Employee committees and improved working conditions

At a meeting in January, employee Pitts raised the issue of establishing a shop committee. There was some discussion of what a shop committee could do, including making suggestions for improvements and putting together a list of problems that the company could address. Pitts stated that Boraski stated that a shop committee was "something that could be talked about after all the Union ordeal is over with," that it would have to await the outcome of the election. Boraski acknowledges that the issue was raised. He recalls responding that he had heard that they worked in other places but he could not comment right now.

The complaint alleges that Boraski encouraged the formation of employee committees. The mutually corroborative testimony of Pitts and Boraski does not support this complaint allegation. Pitts introduced the issue of shop committees, there was discussion of how they worked, and Boraski stated that any further discussion would have to await the outcome of the election. There is no contention that Boraski either encouraged the formation of a committee or stated that he would be receptive to the formation of a committee if the Union were defeated. He made no promise. I shall recommend that this allegation be dismissed.

4. Threat of lost work orders

On January 19, at a company meeting, Respondent's sales manager, Paul Shaffer, informed the employees that an Australian company had refused to permit Respondent to bid on a project after observing the picket line at the facility. He also informed the employees that a current customer had refused a bid submitted by Respondent, citing that Respondent was behind schedule on a current project and noting Respondent's "current labor problems." The General Counsel argues that these remarks constituted a threat of loss of business, and implies that it was incumbent upon Respondent to present evidence that Shaffer's remarks were true. I find no case authority for this proposition. I would certainly analyze this allegation differently if the General Counsel, who has the burden of proof, had established that that there was no basis for Shaffer's remarks; however, the General Counsel adduced no evidence challenging the truth of Shaver's remarks. *Atlantic Forest Products*, 282 NLRB 855, 861 (1987). Unlike *DTR Industries*, 311 NLRB 833 (1993), cited by the General Counsel, the responsibility for the purported economic consequences were attributed to the actions, lawful or otherwise, of third parties. I shall recommend that this allegation be dismissed. *Atlantic Forest Products*, supra at 861.

5. Surveillance

On January 8, the Union conducted a meeting at the Holiday Inn in Sandusky. At a company meeting prior to this union meeting, Mikolay had challenged a statement by Boraski regarding the amount of union initiation fees and mentioned that the Union would be having a meeting at the Holiday Inn on January 8. On the afternoon of the meeting, Collins and Roberts waited outside to direct employees to the meeting room. They observed Respondent's office manager, Deb Kath, arrive and enter the lobby carrying some manila folders. There is a United Parcel Service drop box in the lobby. Deb Kath remained in the lobby for only a minute and then left. Deb Kath confirmed her presence, stating that she was following her normal routine of making the UPS drop after work. In corroboration of her testimony she presented receipts for four packages sent by UPS on January 8. Although Collins and Roberts denied seeing Deb Kath place anything in the UPS drop box, I credit Kath's testimony, as corroborated by the UPS receipts, that she did so. I find that Collins and Roberts simply did not observe her at the moment she placed the documents into the UPS drop box.

The mere presence of a supervisor or management official at a location where union activity is taking place does not establish unlawful surveillance. "[W]here purely fortuitous circumstances bring such parties together there is no dogmatic legal principle by which the employer would be declared to have violated the Act." *Gossen Co.*, 254 NLRB 339, 353 (1981). Consistent with this principle, and in agreement with counsel for Respondent, I find that the presence of Deb Kath at the Holiday Inn pursuant to her normal schedule, but also near the time of the union meeting, was coincidental. *Montgomery Ward & Co.*, 189 NLRB 80, 83 (1971). The record does not establish that Respondent unlawfully engaged in surveillance of a union meeting. I shall, therefore, recommend that this allegation be dismissed.

6. Classifications

There is no complaint allegation regarding classifications. The General Counsel and the Charging Party, in their briefs, refer to testimony by Rahm that, at a company meeting, Boraski mentioned classifications, stating that if an employee was classified as a welder, and there was only 2 hours of welding, the employee would be sent home, "that the Union would not let us . . . work in any other areas." Pitts testified to similar remarks by Belch. In the absence of an allegation placing Respondent on notice that these alleged remarks constituted a violation of the Act and the failure to fully litigate this issue, I shall recommend dismissal on procedural grounds. *Middletown Hospital Assn.*, 282 NLRB 541, 543 (1986). I also note that, even if made, the statement reflects an opinion of what the Union would require. It contains no threat of retaliatory action by Respondent. Thus, as in *Pentre Electric*, 305 NLRB 882, 883 (1991), this statement would be protected by Section 8(c) of the Act, which protects the expression of "any . . . opinion . . . if such expression contains no threat of reprisal or force or promise of benefit."

G. The Bargaining Order and 8(a)(5) Allegations

The stipulated appropriate unit is:

> All full-time welders, fabricators, electricians, and installers employed by the Employer at the Sandusky, Ohio, facility; but excluding all office clerical employees, sales persons, engineers and professional employees, guards and supervisors as defined in the Act, and all other employees.

The parties stipulated that the employees named on the *Excelsior* list constituted the appropriate unit as of December 4, the date of the Union's claimed majority, noting that the eligibility of Jones, who had been discharged, and Collins and Roberts, who had been permanently laid off, would be determined by my decision. Insofar as I have found that all three terminations were unlawful, they are properly included in the unit.

The Union challenged the ballot of Kyle Perkins, contending that he was a supervisor. There is no probative evidence that Perkins served as a supervisor after the second shift was discontinued. The record does not establish when this occurred, although it is clear that it occurred before Christmas because Perkins was supervised by Boraski when working on an installation project that began sometime before Christmas. "A party

seeking to exclude an individual from voting for a collective bargaining representative has the burden of establishing that that individual is, in fact, ineligible to vote." *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). The stipulation for certification upon consent election states that the eligible voters are those employed by Respondent on the payroll period ending December 6. Thus it was incumbent upon the General Counsel or the Union to establish that Perkins was a supervisor on the eligibility date. There is no evidence that Perkins was a supervisor on that date. His status as a former supervisor does not render him ineligible to vote. *Coradian Corp.*, 287 NLRB 1207, 1220 (1988). Thus, I find that Perkins is properly included in the unit.

As of December 4, the unit consisted of 31 employees, including Jones, Collins, Roberts, and Perkins. As of that date a total of 18 employees, a clear majority, had signed unambiguous single purpose cards that authorized the Union to represent them. There was no objection to the admission into evidence of the cards signed by the following employees, all of which were properly authenticated:

Oliver Blount	Frank Mikolay
Mark Christini	Bill Montgomery
Bryan Cloud	Gentle Philon
Ed Collins	Jeremiah Pitts
Ron Fields	Gerald Rahm
Bill Harvey	James Roberts
Freeman Hunter	Thomas Searcy
John Johnson	Chris Wade
Davin Jones	Dave White

Employee Montgomery, who signed a card on October 30, requested that his card be returned on November 3, following the discharge of Jones and permanent layoffs of Collins and Roberts. He told Union Organizer Matt Oakes that he could not afford to lose his job. Under longstanding Board precedent, the attempted revocation of a card that is "the product of Respondent's unfair labor practices" is ineffectual. *Dlubak Corp.*, 307 NLRB 1138 fn. 2 (1992). Even if I considered this card to have been revoked, the remaining 17 authorizations would constitute a majority in the unit of 31.

Respondent argues that a bargaining order should not issue since, assuming Jones, Collins, and Roberts were unlawfully discharged and, therefore, their ballots should be counted, the Union presumptively retained the support of 16 employees. Hence, there was no "erosion of support for the Union because of actions by the Company." Although this argument has a certain appeal, it is based upon the speculation that Jones, Collins, and Roberts continued to support the Union and voted for representation. If Respondent's retaliation against them dissuaded them from their support of the Union, the opening of the challenged ballots will not change the result of the election which the Union lost by a vote of 14 to 13. Respondent contends that these employees were lawfully terminated. Thus it is contending that the unit consists of 28 employees, 15 of whom authorized the Union to represent them, but only 13 of whom voted for the Union.

I find, in the circumstances of this case, that the holding of a fair election in the future would be virtually impossible. Upon Respondent's learning of union organization activity, it terminated three of the six employees who attended the first union meeting, and then laid off two of the employees who attended the second union meeting. As of November 5, the number of employees working at plants 1 and 2 had been reduced from 24 to 19, approximately 20 percent of the work force at the plants. Boraski threatened closure, Garba threatened closure, Kath repeated the threat of closure. The leading remaining union adherent, Mikolay, was subjected to isolation and monitoring, having his worktable moved to the supervisor's doorway. Thereafter, threats of closure were repeated by Boraski. I am mindful that Respondent most egregious unlawful actions were concentrated into the period following the first two union meetings. Respondent's swift retaliation was not lost on the employees. Montgomery requested recession of his authorization card. In this case, as the Board found in *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996), I find that Respondent's concentrated unlawful actions "enhanced their severity and lasting impact on employees' free choice."

In view of the foregoing and the entire record, I find that the possibly of erasing the effects of Respondent's unfair labor practices is slight and that the holding of a fair election is unlikely. Thus, I find that a bargaining order is warranted.

H. Election Challenges and Objections

1. Challenges

The representation election conducted on January 20 resulted in 13 votes being cast for the Union, 14 votes being cast against the Union, with 4 determinative challenged ballots. Three of those were the ballots of alleged discriminatees Davin Jones, Ed Collins, and James Roberts. I have found that all three of these alleged discriminatees were unlawfully discharged. The fourth challenged ballot was that of alleged Supervisor Kyle Perkins, whom I have found is properly included in the unit. In view of the foregoing I shall recommend that all four challenged ballots be opened and counted. If the revised tally of ballots shows that the Union has lost the election, the petition should be dismissed in view of the bargaining order that I have found to be warranted. If the Union has won the election, the bargaining order should be given effect and, additionally, the Regional Director shall issue a certification of representative. *F. L. Smithe Machine Co.*, 305 NLRB 1082 (1992).

2. Objections

The order directing a hearing on the Union's objections referred to hearing every objection that was coextensive with a complaint allegation. All parties, in their briefs, correctly note that only conduct that occurred during the critical period, between the filing of the petition and the date of the election, may serve as a basis for setting aside an election.

The Charging Party argues that Boraski's individually speaking with each employee the day before the election, requesting the support of the employee, was tantamount to a prohibited captive audience speech. The conversations were at the employees' work stations, and there is no evidence of any coercive statement in these conversations. Such conversations, in the absence of evidence of coerciveness, do not constitute a captive audience speech in violation of *Peerless Plywood*, 107 NLRB 427 (1953). *Flex Products*, 280 NLRB 1117 (1986). I shall, therefore, recommend that objection 14 be overruled.

I have found that Respondent's January suspension of Mikolay, who was the leading remaining proponent of the Union, violated Section 8(a)(3) of the Act. This is alleged as objectionable conduct in Objection 9. I have also found various 8(a)(1) violations that are coextensive with various objections to the election filed by the Union. Objection 8 relates the treatment of

Mikolay who, during the critical period, was more closely monitored and isolated, restricted from talking to other employees, and harassed. Objection 19 alleges Belch's threat of futility, Objection 24 alleges threats of loss of benefits which I have found Boraski made, and Objection 25 alleges threats of plant closure which I have found were made during the critical period by Boraski and Belch to Pitts.

I find the foregoing violations of the Act that occurred during the critical preelection period and that correspond to the Union's objections interfered with the employees' free choice of representation. Notwithstanding this finding, in view of my finding that a bargaining order is appropriate, the petition should be dismissed if the revised tally of ballots shows that the Union has lost the election.

CONCLUSIONS OF LAW

1. By advising employees who support the Union that they should quit, threatening loss of jobs and plant closure, advising employees that selection of the Union as their collective-bargaining representative is futile, more closely monitoring and isolating employees who support the Union, threatening not to excuse previously excused absences of employees who support the Union, restricting employees who support the Union from talking with other employees, harassing employees who support the Union, interrogating employees concerning their activities on behalf of the Union, directing employees not to cooperate with the Union in obtaining evidence with regard to objections to an election, and threatening loss of benefits and more strict enforcement of company rules in an effort to dissuade employees from supporting the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

2. By discharging Davin Jones on October 30, 1997, permanently laying off Ed Collins and James Roberts on November 3, 1997, laying off Bryan Cloud and John Johnson on November 4, 1997, laying off Ron Fields on December 2, 1997, warning Frank Mikolay on November 10, 1997, and suspending Frank Mikolay effective January 5, 1998, because of their union sympathies and activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

3. Since December 4, 1997, the Union has been the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, representing a majority of the employees in the following appropriate unit:

> All full-time welders, fabricators, electricians, and installers employed by the Employer at the Sandusky, Ohio, facility; but excluding all office clerical employees, sales persons, engineers and professional employees, guards and supervisors as defined in the Act, and all other employees.

4. By refusing to recognize and bargain with the Union since December 4, 1997, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Davin Jones, permanently laid off Ed Collins and James Roberts, and laid off without recalling Bryan Cloud and John Johnson, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the discharge and layoffs to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having discriminatorily laid off Ron Fields, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis from December 2, 1997, until February 23, 1998, the date he was recalled, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., supra, plus interest as computed in *New Horizons for the Retarded*, supra.

The Respondent must also remove any reference to the foregoing discharges and layoffs from the files of the foregoing employees and must also rescind the warning and suspension issued Frank Mikolay and remove any reference to them from his file.[10]

Having found that a bargaining order is appropriate, Respondent, on request, shall bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit.

Insofar as Respondent's violations of the Act are sufficiently egregious so as to warrant a bargaining order, it follows that a broad cease and desist order is appropriate. *Hickmont Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, General Fabrications Corp., Sandusky, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Advising employees who support Sheet Metal Workers International Association of Northern Ohio, Local Union No. 33, AFL–CIO or any other union that they should quit.

(b) Threatening loss of jobs and plant closure in order to discourage employees from engaging in union activities.

(c) Advising employees that selection of the Union as their collective-bargaining representative is futile.

(d) More closely monitoring and isolating employees who support the Union.

(e) Threatening not to excuse previously excused absences of employees who support the Union, restricting employees who support the Union from talking with other employees, and harassing employees who support the Union.

(f) Interrogating employees concerning their activities on behalf of the Union and directing employees not to cooperate with the Union with regard to objections to an election.

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[10] Mikolay is due no backpay since he was physically unable to work when suspended.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Threatening loss of benefits and more strict enforcement of company rules in an effort to dissuade employees from supporting the Union.

(h) Discharging, laying off, suspending, warning, or otherwise discriminating against any employee for supporting the Union.

(i) Refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Davin Jones, Ed Collins, James Roberts, Bryan Cloud, and John Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Davin Jones, Ed Collins, James Roberts, Bryan Cloud, John Johnson, and Ron Fields whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and layoffs and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning and suspension issued to Frank Mikolay and notify him in writing that this has been done and that these actions will not be used against him in any way.

(e) On request, bargain with Sheet Metal Workers International Association of Northern Ohio, Local Union No. 33, AFL–CIO as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time welders, fabricators, electricians, and installers employed by the Employer at the Sandusky, Ohio, facility; but excluding all office clerical employees, sales persons, engineers and professional employees, guards and supervisors as defined in the Act, and all other employees.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Sandusky, Ohio, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 30, 1997.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the challenges to the ballots of Davin Jones, Ed Collins, James Roberts, and Kyle Perkins are overruled.

IT IS FURTHER ORDERED that Case 8–RC–15667 is severed from Case 8–CA–29443 et. al, and that it is remanded to the Regional Director for Region 8 for action consistent with the direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 8 shall, within 10 days from the date of this decision, open and count the ballots of Davin Jones, Ed Collins, James Roberts, and Kyle Perkins, and prepare and serve on the parties a revised tally of ballots.

If the final revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots case, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots case, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 8–RC–15667.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT advise you that you should quit if you support Sheet Metal Workers International Association of Northern Ohio, Local Union No. 33, AFL–CIO or any other union.

WE WILL NOT threaten you with loss of jobs and plant closure in order to discourage you from engaging in union activities.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT advise you that selection of the Union as your collective-bargaining representative is futile.

WE WILL NOT more closely monitor or isolate those of you who support the Union.

WE WILL NOT threaten you with unexcused absences, restrict you from talking to other employees, or harass you because you engage in union activities.

WE WILL NOT interrogate you concerning your activities on behalf of the Union and WE WILL NOT direct you not to cooperate with the Union with regard to objections to an election.

WE WILL NOT threaten you with loss of benefits and more strict enforcement of company rules in an effort to dissuade you from supporting the Union.

WE WILL NOT discharge, lay off, suspend, warn, or otherwise discriminate against any of you because you support the Union.

WE WILL NOT refuse to bargain collectively with Sheet Metal Workers International Association of Northern Ohio, Local Union No. 33, AFL–CIO as your exclusive bargaining representative in the following unit:

> All full-time welders, fabricators, electricians, and installers employed by us at our Sandusky, Ohio, facility; but excluding all office clerical employees, sales persons, engineers and professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning your terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Davin Jones, Ed Collins, James Roberts, Bryan Cloud, and John Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Davin Jones, Ed Collins, James Roberts, Bryan Cloud, John Johnson, and Ron Fields whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Davin Jones and unlawful layoffs of Ed Collins, James Roberts, Bryan Cloud, John Johnson, and Ron Fields, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that these actions will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order remove from our files any reference to the unlawful warning and suspension issued to Frank Mikolay, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that these actions will not be used against him in any way.

GENERAL FABRICATIONS CORP.